2017-HC-DEM-CIV-FDA-1643

# IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

## PROCEEDINGS FOR OTHER ADMINISTRATIVE ORDER

**BETWEEN:**

**ZULFIKAR MUSTAPHA**

**Applicant**

**and**

**THE ATTORNEY GENERAL**

**Respondent**

Mr. Mohabir A. Nandlall, Mr. Manoj Narayan
and Mr. Rajendra Jaigobin for the applicant

Mr. Basil Williams SC, Mr. Hal Gallop QC, Mr. Ralph Thorne QC
Ms. Kim Kyte-Thomas and Ms. Judy Stuart for the respondent

Nov 16, 2017, Jan 5; June 8, 2018

**Coram: Chief Justice Roxane George**

**Decision of the Court**

### Introduction

On October 23, 2017, the Applicant filed a Fixed Date Application seeking:

1. A Declaration that the appointment of Reverend Justice (ret'd) James Aloysius Patterson by His Excellency President David Arthur Granger on the 19th day of October, 2017 as the Chairman of the Guyana Elections Commission is in violation of and contrary to Article 161(2) of the Constitution of the Co-operative Republic of Guyana and is accordingly unlawful, illegal, unconstitutional, null, void and of no effect;

2. A Declaration that the Reverend Justice (ret'd) James Aloysius Patterson is not qualified to be appointed as the Chairman of GECOM in accordance with and in pursuance to Article 161(2) of the Constitution of the Cooperative Republic of Guyana;

3. An Order directing His Excellency, President David Arthur Granger to choose a person from the eighteen (18) names submitted to him by the Leader of the Opposition;

4. An Order rescinding, revoking, cancelling and setting aside the appointment of Reverend Justice (ret'd) James Aloysius Patterson by His Excellency President David Arthur Granger on the 19th day of October, 2017 as the Chairman of the Guyana Elections Commission.

**Facts**

On December 21, 2016, the Leader of the Opposition (LOP) submitted a list of six names ('the first list') to the President, for the President to appoint a Chairman of the Guyana Elections Commission (GECOM) from that list. On January 5, 2017, the President informed the LOP that he had found the six nominees on the first list to be unacceptable within the meaning of the Constitution in that the resumés "do not seem to conform to the requirements of the aforementioned article 161(2)". On March 1, 2017, the LOP requested of the President some of the qualities which the President would be looking for in a person who is to be appointed Chairman of GECOM, and by letter dated March 14, 2017, the President provided a list of such qualities. This letter is as follows:

"***Ministry of the Presidency***
**Vlissengen Road, Bourda, Georgetown**
**Cooperative Republic of Guyana**

2017.03.14

Hon. Bharrat Jagdeo, M.P.
Leader of the Opposition

Office of the Leader of the Opposition
Church Street
Queenstown, Georgetown.

Dear Mr. Jagdeo,

You had requested, at our meeting on Wednesday 2017.03.01, my opinion of the qualities that the candidate to be Chairman of the Guyana Elections Commission should possess.

I forward a statement of the qualities for your consideration.

Yours sincerely,

David Granger
President of the Cooperative Republic of Guyana.

Attachment: Statement.

Qualities of the Chairman of the Guyana Elections Commission

1. The candidate should be a person who is qualified to be a Judge of the High court under Article 129 of the Constitution and under section 5 of the High Court Act, Cap. 3:02.

2. That person should have been an Attorney-at-Law for a minimum of 7 years, according to section 5 of the High Court Act, Cap. 3:02.

3. In the absence of 1 and 2 above "any other fit and proper person" should be appointed according to Article 161(2) of the Constitution.

The categories of persons specified above are necessary because such persons should have the following characteristics:

a) That person is deemed to have wide electoral knowledge, capable of handling electoral matters because he or she is qualified to exercise unlimited jurisdiction in civil matters;

b) That person will discharge his or her functions without fear or favour, that is, he or she will not allow any person or organization to influence him or her to compromise his or her neutrality;

c) That person will discharge his or her functions neutrally, between the two opposing parties, as he or she would have done in Court between two opposing litigants;

d) That person will not be an activist in any form (gender, racial, religious etc);

e) That person should not have any political affiliation or should not belong to any political party in any form, apparent or hidden; and,

f) That person should have a general character of honesty, integrity, faithfulness and diligence in the discharge of his or her duty as Chairman."

On May 2, 2017, the LOP submitted the names of six other persons ('the second list') for the President to appoint a Chairman of GECOM. On June 2, 2017, the President informed the LOP that having "examined the Curricula Vitae of the six persons in light of the criteria" defined in the letter of March 14, 2017, he found the second list to be unacceptable within the meaning of the Constitution and those criteria. Further consultations were conducted between the President and the Opposition Leader on June 12, 2017, and a joint public statement was issued by the Government and the LOP on that date. On July 17, 2017 pursuant to an application for an interpretation of art 161 of the Constitution, I ruled in ***Marcel Gaskin v the Attorney General et al*** **2017-HC-DEM-CIV-FDA-160** (unreported) (***Gaskin***), *inter alia*, that the President may reject the entire list even if he considers that only one or some person(s) on the list is or are unacceptable, and that he had to provide reasons for rejecting a list as unacceptable.

Subsequently, the LOP on August 25, 2017, submitted a third list of six names ('the third list') for the President to appoint a Chairman of GECOM. By letter dated October 19, 2017, the President informed the LOP that he found the third list to be unacceptable within the meaning of the Constitution. The President also

indicated at that time that he would resort to the proviso to **art 161(2)** of the Constitution and proceed without further delay to appoint a person as Chairman of GECOM, as provided for by the Constitution. On the evening of the same day, October 19, 2017, Retired Justice James Patterson was appointed and sworn in as the Chairman of GECOM. The letter of October 19, 2017 is as follows:

"***Ministry of the Presidency***
**Vlissengen Road, Bourda, Georgetown**
**Cooperative Republic of Guyana**

2017.10.19

Hon. Bharrat Jagdeo, M.P.
Leader of the Opposition
Office of the Leader of the Opposition
Church Street
Queenstown, Georgetown.

Dear Mr. Jagdeo,

**Appointment of Chairman, Guyana Elections Commission**

Having considered the provisions of Article 161(2) of the *Constitution of the Cooperative Republic of Guyana* which gives me the authority to appoint a Chairman of the Guyana Elections Commission (GECOM) from the final list submitted by the Leader of the Opposition "of six persons not unacceptable the President," and the proviso thereto and, also, that Article 182(1) of the *Constitution* empowers me to act in my own deliberate judgement when exercising such discretion, I have decided that it would not be in the public interest to delay, further, the appointment of a Chairman of GECOM.

Having considered, further, the ruling of the Chief Justice, the Hon. Roxane George-Wiltshire, in the case of Marcel Gaskin V AG et al, in which she gave the following answers to the Applicant's questions, inter alia:

> "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. (p.30).

> "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 (he or she) qualify even though every other name in the list is not acceptable. Therefore the whole list need not be rejected." (p.26)

I have paid careful attention to the ruling of the Chief Justice.

Having examined, further, the Chief Justice's answers in relation to the President's having to give reasons for his rejection of a list, that is to say:

> "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." (p. 29).

I understand this to mean that, only where I agree to more than one list, reasons must be given.

Having rejected an earlier list, I did give you, the Leader of the Opposition, at your request, a list of criteria or characteristics that would make listed persons acceptable, to wit:

> [Here was stated the criteria from the letter of March 14, 2017 outlined above.]

Having carefully examined the names of the six persons on the list dated 2017.08.25, it is my considered view that the list is "unacceptable" within the meaning of the *Constitution.*

Having found the list dated 2017.08.25 unacceptable, therefore, I have placed reliance on the Chief Justice's ruling that, in exercise of my decision to reject the list dated 2017.08.25, I could:

> "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." (p. 30)

I formally inform you, therefore, that in the public interest, I shall appoint a person as provided for by the Constitution to be Chairman of GECOM without further delay.

Yours sincerely,

David Granger
President of the Co-operative Republic of Guyana"

This application has its genesis in the appointment of Justice Patterson which it seeks to challenge. The preliminary issue that arises is which list or lists should be examined. While the Constitution appears to contemplate only one list, three lists were submitted which were all rejected. Given the fact that this Court, in ***Gaskin***, considered it a moot point whether more than one list should have been submitted since both parties engaged in the process of allowing for the submission of more than one list, in the context of this case, the point at which the President chose to resort to the proviso indicate that the only reasonable option would be to examine the third (and final) list. Let me therefore state from the outset that as regards this application this Court is considering only the rejection of the third list that resulted in the resort to the proviso to **art 161(2)** and the appointment of Justice Patterson. This is because the rejection of the first two lists would have already been accepted by the LOP. The provision of subsequent lists so confirms. Put another way, by submitting other lists, the LOP clearly accepted the President's determination that the previous list and ultimately the two previous lists were unacceptable. Thus, the prayer for a direction by this court for the appointment of one of the eighteen persons named in the three lists provided cannot be sustained. I will return to a consideration of this prayer.

**Article 161** 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.)

**Issues**

Apart from my decision as regards the third list, the issues to be determined in this application may be divided into two categories, the first being issues preliminary to the hearing and determination of the application and the second being the substantive issues of the application.

The **preliminary issues** to be determined are whether:

(i) this Court has the jurisdiction to hear and determine the application;

(ii) the applicant has *locus standi* to make this application.

The **substantive issues** of the application are whether:

(i) the appointment of Justice Patterson by the President was unconstitutional because the President had no power to make a unilateral appointment once a list of six names was submitted to him by the LOP;

(ii) the President is required to give reasons for deeming the list submitted by the LOP unacceptable;

(iii) the President failed to give any reason for deeming the list submitted by the Opposition Leader unacceptable;

(iv) a failure by the President to give reasons for deeming the list submitted by the LOP unacceptable makes the appointment of Justice Patterson as Chairman of GECOM unconstitutional and therefore null and void;

(v) Justice Patterson is not qualified to be appointed Chairman of GECOM in accordance with and pursuant to **art 161(2)** of the Constitution.

**Preliminary Issue No. 1: Jurisdiction of the Court**

The respondent has submitted that the appointment of the Chairman of GECOM under **art 161(2)** of the Constitution is not enforceable by the courts owing to: (i) the maxim '*expressio unius est exclusio alterius*', and (ii) the executive power in the President to appoint a Chairman of GECOM being in the nature of a convention. Therefore, it is argued by the respondent, this Court should restrain itself from engaging in the inquiry sought by this application.

As regards this well known Latin maxim, when one or more members of a class of things are expressly mentioned, the *expressio unius* principle serves to exclude those members of the class not identified. The respondent submits that **art 163** of the Constitution provides for a complete list of matters arising under Title 2 of the Constitution, headed 'Parliament' which the High Court has exclusive jurisdiction to determine. It was contended that since this **art 163** list does not include express reference to **art 161**, all questions contained in **art 161** are excluded from the jurisdiction of the High Court. **Article 163**, however, deals specifically with the "Determination of Questions as to membership and elections", according to its marginal note, which is part of the law as recognized by **sec 57(3)** of the

**Interpretation and General Clauses Act, Cap. 2:01. Article 163** has expressly conferred jurisdiction on the High Court to determine questions relating to elections and membership of the National Assembly. The *expressio unius* principle cannot therefore apply to exclude the jurisdiction of the Court from determining questions in relation to **art 161**, since **art 163** cannot impliedly exclude something, in this case the appointment of the Chairman of GECOM, which does not form part of the category or class of things being addressed, in this case elections and membership of the National Assembly.

Further, in ***Gaskin*** it was noted that the High Court, as a court of original and unlimited jurisdiction, and as the guardian of the Constitution, has inherent jurisdiction to interpret the Constitution. This is confirmed by **art 133(1)** of the Constitution, which provides that appeals shall lie to the Court of Appeal as of right from, *inter alia*, final decisions of the High Court "in any civil or criminal proceedings on questions as to the interpretation of the Constitution". **Article 133(2)** expressly excludes the matters for which provision is made in **art 163** from the operation of **art 133(1)**, indicating that the general powers of the High Court to determine questions regarding the interpretation of the Constitution, including **art 161(2)**, are preserved.

The second reason relied on by the respondent in its argument that this Court does not have jurisdiction is that the power of the President to appoint the Chairman of GECOM is in the nature of a convention and is thus not enforceable before the courts. In support of this contention, the respondent has cited '**Fundamentals of Caribbean Constitutional Law**' by Robinson, Bulkan & Saunders J (Sweet & Maxwell 2015) which, the respondent submitted, indicates that the power of the Head of State to appoint a Prime Minister in his or her own deliberate judgment or discretion is among the prerogatives exercised by the Head of State where judicial

intervention is limited. The respondent thus submitted that the power to appoint the Chairman of GECOM is of a similar nature. In the excerpt of the text as cited (p 75 para 2-007), which is under a section titled '**The codification of conventions in the constitutions**', the authors identified one such convention as the power of the Head of State to appoint a Prime Minister as an example of what was termed "*a curious amalgam of 'preserved' common law powers and conventions*". In this context, the authors noted that several constitutions have codified a convention that **limits** the appointment of a Prime Minister to the elected member of Parliament who commands the support of the majority of elected members of Parliament. Guyana has not codified such a convention, and apart from the proviso, the power of the President to appoint a Chairman of GECOM is circumscribed by **art 161(2)**.

Unlike the power contained in **art 101(1)** of the Constitution, whereby the power of the President to appoint a Prime Minister is qualified only by the requirement that the person to be so appointed must be eligible for appointment as President, **art 161(2)** is much more restrictive in its guidelines. In particular, **art 161(2)** does not give the President the sole power to appoint the Chairman of GECOM without the involvement of the LOP in the first instance. The article limits the persons who may be appointed as Chairman of GECOM to persons who hold, have held or are qualified to hold office as a judge of a court having unlimited jurisdiction in civil and criminal matters in the Commonwealth, or of a court of appeals from any such court (the judicial category per ***Gaskin***) or "any other fit and proper person" (the non-judicial category per ***Gaskin***). As held in ***Gaskin***, 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, such as integrity, honesty and impartiality, though the person does not have to have legal qualifications or training. Even though not expressly stated, **art 161(2)** indicates

the qualities which must be possessed by someone to be appointed as Chairman, a limitation which the President is not subjected to in **art 101(1)**.

Secondly, **art 161(2)** provides that the Chairman of GECOM shall be appointed from a list of six persons, not unacceptable to the President, submitted by the LOP. The President cannot, therefore, proceed to appoint a Chairman of GECOM without first considering a list submitted by the LOP, or without affording the LOP the opportunity to provide such a list. Unlike in the appointment of the Prime Minister, where the President is free to consider any Member of Parliment and make an appointment without the involvement of anyone else, **art 161(2)** requires the President to choose one of the six persons submitted by the LOP, provided that the list is not unacceptable to him. And, even in determining the acceptability of the list, the President must have regard to the qualities indicated by the article. Thus, in addition to **art 161(2)** indicating the qualities which the Chairman of GECOM must possess, the article also requires the involvement of the LOP.

Thirdly, **art 161(2)** contemplates not only the involvement of the LOP Leader, but also of other members of the National Assembly, since the LOP is to submit the list after meaningful consultation with the non-governmental political parties represented in the National Assembly. Though there is only one non-governmental political party currently represented in the National Assembly, it does not remove the fact that the Constitution contemplates and permits, where there are more than one parties in the National Assembly, the participation of each of those parties, even if a party has only one representative. Again, unlike the appointment of the Prime Minister, where the President is free to make the appointment completely on his own, the appointment of the Chairman of GECOM allows for the involvement of all other non-governmental political parties represented in the National Assembly, if there is more than one.

Considering the above differences, the appointment of the Chairman of GECOM by the President cannot be placed on the same plane as the appointment of the Prime Minister. Further, there is nothing to support the classification of either the appointment of the Prime Minister or the Chairman of GECOM as a convention in the context of the Constitution of Guyana;

The respondent then submitted on ouster clauses contending that the court was ousted from enquiring into the decision made by the President to appoint the GECOM Chairman. However, the submissions reflect an admission that the learned authors of the text referred to above recognize: that an approach is emerging in which even such clauses are not viewed as completely removing the jurisdiction of the courts. Importantly, though, not only is there an absence of an ouster clause in this case, but any suggestion that, owing to the immunity of the President under **Article 182(1)** of the Constitution, the actions of the President are beyond the reach of judicial direction has been answered in the negative in ***Gaskin*** relying on the authorities cited therein. Support for this position was garnered from the Privy Council in ***The Attorney General v Dumas*** **TT 2017 PC 4**. Also, in ***The Attorney General et al v Joseph and Boyce*** **[2006] CCJ 3 (AJ) (paras 20 – 21)**, Justice Wit, stated that "[t]he multi-layered concept of the rule of law establishes, first and foremost, that no person, not even the Queen or her Governor-General, is above the law." Then His Honour while referring to the Barbados Privy Council which determines the prerogative of mercy in death penalty cases made observations that can be considered to be of general application. His Honour noted that however eminent the members of that body may be, their executive functions are discharged under the Constitution and therefore cannot go unchecked by the courts. Justice Wit further stated that "[b]oth the executive acceptance of judicial

scrutiny and judicial respect for executive discretion are required under the rule of law and flow from the separation of powers."

For the above reasons, therefore, this Court must find that there is nothing ousting or even limiting its inherent jurisdiction to hear and determine this application, and that it thus has the jurisdiction to proceed to do so. I comment that some of the submissions by the respondent on the jurisdiction sought to regurgitate arguments which were addressed and not accepted in ***Gaskin***.

**Preliminary Issue No. 2: Locus Standi of the Applicant**

In ***Gaskin***, the issue of locus standi of the applicant was canvassed and addressed. I said then that "*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*". As such, I held that "*as a citizen and an elector, the applicant ha[d] a relevant interest in the appointment of a Chairman of GECOM and as such ha[d] locus standi to make [that] application*". In ***Dumas* (*supra*, 2014 para 95 CA)**, it was noted that judicial discretion in determining *locus standi* will have to be exercised in each case, depending, *inter alia*, on the legal and factual context, the merits of the challenge, the importance of the issue and the public interest in having it determined.

The respondent submits that such discretion should be exercised differently in this case as the legal and factual context is manifestly and fundamentally distinct from that in ***Gaskin***. The first reason given for this submission is that the applicant has based his standing not only on being a citizen and a registered elector, but also on the representation that he is the Executive Secretary of the People's Progressive Party ('the PPP') and a member of the National Assembly. The respondent also contends that the applicant, in making reference to the General Secretary of the

PPP being the LOP, has sought to interpose himself into a constitutional relationship and transaction that exists exclusively between the LOP and the President.

In relation to the first reason, the respondent has not provided any evidence to suggest that the assertion by the applicant that he is the Executive Secretary of the PPP and a member of the National Assembly, diminishes his standing as a citizen and a registered elector, which was the basis on which the applicant in ***Gaskin*** was held to have the requisite *locus standi*. The respondent has submitted that the applicant "elevates his status beyond that of a mere ordinary citizen and elector" by relying "on his office in his political party and on his membership of the National Assembly". While this is unnecessary for a determination of this case as accepted by Mr. Narayan for the applicant, it is arguable that such information emphasizes the interest of the applicant in respect of the subject matter of this application. **Article 161(2)** of the Constitution, which speaks to the appointment of the Chairman of GECOM, as well as **art 161(3)**, which speaks to the appointment of the other members of the Commission, both note that the submissions by the LOP must be made after meaningful consultation with the non-governmental political parties represented in the National Assembly. It is clearly contemplated therein that it is not only the LOP who is involved in the appointment of members of the Commission and, more relevant to this application, the Chairman of GECOM. As noted, non-governmental political parties are clearly intended to take part in the process, through their representatives in the National Assembly. The fact that there is only one non-governmental political party, the PPP, does not remove the fact that the Constitution intended for there to be consultation between the LOP and other members of the National Assembly. Thus, while the applicant's status in the PPP may not further enhance his interest in bringing this application, his

membership of the National Assembly, at the very least, cannot subtract from the interest he has as a citizen and a registered elector. In fact, given the contemplated involvement of other members of the National Assembly in the process of appointing the Chairman of GECOM, it may emphasize the interest that he does have, as was said in ***Gaskin***, in knowing how that position is to be filled and in having the Court bring clarity where there is ambiguity or uncertainty in respect of the said appointment. It is also clear, given the foregoing, that the Constitution did not intend for the appointment to involve only two individuals in the persons of the President and the LOP. The fact that the LOP is General Secretary of the same party represented by the applicant is irrelevant in determining whether the applicant has the requisite *locus standi* to make this application.

The respondent has also submitted that the applicant cannot claim an ascertainable legal right in relation to the appointment of the Chairman of GECOM, and cited ***Frank v the Attorney General*** **1994 CA 15 (A'gua & B'da)** among other cases to which there is no need to refer. However, the excerpt quoted from this case clearly draws a distinction between applications made for judicial review and those made in "*proceedings other than proceedings for judicial review*". While the Court of Appeal in ***Frank*** said that in the latter case the applicant must establish that the respondent has infringed or threatened to infringe on the applicant's present or future legal or equitable rights, the Court noted that in proceedings for judicial review *locus standi* is determined by reference to whether or not the applicant has a sufficient interest in the matter to which the application relates.

Considering the interest of the applicant, in his capacity as a citizen and a registered elector, and also considering his status as a member of the National Assembly representing a non-governmental party, the applicant does have *locus*

*standi* to make this application which, as in ***Gaskin***, is again concerned with the interpretation and application of **art 161(2)** of the Constitution.

**Substantive Issue No.1: Power of the President to make Unilateral Appointment**

The applicant claims that the appointment of Justice Patterson by the President was unconstitutional and therefore null and void because the President had no power to make a unilateral appointment once a list of six names was submitted to him by the LOP.

The applicant submitted that it was ruled in ***Gaskin*** that the applicability of the proviso is merely academic at this point since the President requested more than one set of names, and thus the President could not then activate the proviso. However, this ruling was against the backdrop of two lists having been submitted at the time of the hearing of that case and in the context of a finding that in fact "*the Constitution only contemplates the submission of one list*". To clarify, I merely said that what article 161(2) seemed to contemplate is that if the President rejected the first list he could proceed to activate the proviso and select a Chairman from the judicial category but that, since more than one list had already been provided, my finding could not reverse the submission and rejection of the second list.

The applicant has however argued that once the LOP has acted judiciously and not capriciously in providing a list, and the persons thereon can reasonably be viewed as fit and proper for appointment to the post of Chairman of GECOM, the President must select one of those persons as the list would then be 'not unacceptable'. The applicant further submitted that it is the LOP, and not the President, who must make the factual assessment of whether the persons on the list are fit and proper. The submissions by the respondent amount to a re-litigation of

issues that have been discussed and decided in ***Gaskin***. It was held in ***Gaskin*** that while it would be expected that the LOP would name persons who are *prima facie* fit and proper, that it is the President who will ultimately make the final determination of who is a fit and proper person for the post since the list of persons must not be unacceptable to him. This is to say, the President has the final say in determining who would be appointed as Chairman of GECOM albeit, either from the list provided by the LOP or pursuant to the proviso, a person who falls solely within the judicial category as defined in ***Gaskin***.

The applicant also submitted that 'not unacceptable' falls somewhere between 'acceptable' and 'unacceptable', but goes on to say that a person can be 'unacceptable' but still not be 'not unacceptable'. The latter part of this submission is clearly flawed, since even if these terms are to be seen on a spectrum, as suggested by the applicant, with 'acceptable' at one end, 'unacceptable' at the other and 'not unacceptable' in the middle, someone who is found to be at the 'unacceptable' end cannot at the same time be found to be 'not unacceptable'.

The respondent, on the other hand, has submitted that the use of the double negative is an example of litotes which, it is argued, is an intentional literary device meant to emphasize the wide ambit of the President's discretion. The respondent submitted that, in this context, it locates the power of determination solely within the mind of the President.

As I said above, this issue was comprehensively addressed and conclusively answered in ***Gaskin***, where the history of art 161 (2) was outlined and the phrase 'fit and proper' as well as the proviso were discussed in detail. It was held in ***Gaskin*** that -

> "*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 feels 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.*"

And later that

> "*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.*"

In this decision, which still stands, (the respondent's submission that it may be departed from is addressed below), it has clearly been decided by this Court that the President has the power, under **art 161(2)** of the Constitution, to reject the list submitted by the LOP if it is unacceptable to him and to resort to the proviso of that article and choose a person as Chairman of GECOM who is, was, or is qualified to be appointed as a judge in Guyana or the Commonwealth.

As discussed in ***Gaskin***, it is clear that **art 161(2)** was intended to contribute to the balance and impartiality of the Elections Commission. Pursuant to **art 161(3)** half of the Commission is intended to be chosen by the Government, and the other half by the non-governmental party or parties represented in the National Assembly. In the same spirit, **art 161(2)** provides for the involvement of both Government (in the person of the President) and non-governmental party or parties (in the person of the LOP, who must meaningfully consult with any other non-governmental party or parties who are represented in the National Assembly) in the appointment of the Chairman of GECOM.

However, as emphasised in ***Gaskin***, this does not mean that the President is bound to appoint someone from a deficient list. As discussed in that case, the President may reject the entire list even if he finds only one person to be unacceptable. Apart from **art 161 (2)** which inferentially indicates the qualities that must be possessed by a Chairman of GECOM (which qualities may also be found in **art 122A** –

**Independent Judiciary**), the President himself supplied criteria by which the persons on the list may be objectively assessed in the form of the list of qualities sent to the LOP in the March 14, 2017 letter set out above. There is no evidence that the LOP disputed or challenged the contents of the letter. Therefore, provided that the persons on the list submitted possess those qualities, **art 161(2)** requires the President to then appoint the person that he finds acceptable, from that list, to be Chairman of GECOM. Only if one or more persons on the list do not possess those qualities, making the list unacceptable to the President, is the President then justified in resorting to the proviso and making an independent appointment. In making both his objective assessment and his subjective choice, **art 111(1)** still gives the President the power to act "*in accordance with his own deliberate judgment*". The exercise of his discretion pursuant to **art 161(2)** is not fettered by a requirement that he act in accordance with the advice or recommendation of the LOP.

Despite the conclusions in ***Gaskin***, the applicant has nevertheless argued that the proviso has to be read in the context of the provision to which it relates. It was submitted that although it is usually meant to restrict the scope of the main provision, the proviso of itself should be given a restricted meaning so as to bring it within the ambit of its main provision. NS Bindra's 'Interpretation of Statutes' 11th edn by Amita Dhanda at pp 237 - 238 and 240 was cited as follows:

> "The correct way to understand a proviso is to read it in the context and not in isolation. It assumes the tenor and color of the substantive enactment. ... There is no magic in the words of a proviso. The proper way to regard a proviso is as a limitation upon the effect of the principal enactment. It is an accepted principle of interpretation of a 'proviso' (which is generally an exception to the main rule) to assign it a 'meaning' which restricts scope.
>
> ...

> A court should not so construe a proviso as to attribute to the legislature an intention 'to give with one hand and take with another'. A sincere attempt should be made to reconcile the enacting clause and the proviso and to avoid repugnancy between the two."

However, the proviso to art 161(2) provides an alternative in case the list provided proves to be unacceptable. This is to say, the proviso provides for a Plan B, if Plan A, requiring consensus, is not achieved. It contemplates the possibility of a stalemate and provides for such. Therefore, in the context of this case, the proviso cannot be said to be restricted by its main provision. In this regard, the following is stated at p 241 of Bindra's text:

> "Where the purview of the section and the proviso cover the same field and the two are irreconcilable, the proviso is given its full effect since it happens to be the last expressed intention of the legislature. The courts always presume the legislature inserted every part of the statute for a purpose and the legislative intention is that every part of the statute should have effect."

The fact that consensus was reached on previous occasions does not disallow a situation where consensus has not been reached. As noted above, the Constitution via the proviso so contemplates and provides for a case where consensus has not been arrived at. The applicant also quoted from the text ***Constitutional Law of Guyana*** (2013) by Justice S. Y. Mohamed, retired High Court Judge of Guyana, who expressed the opinion that if the LOP "fails to submit a list, then the President will appoint a person qualified as a judge." With the greatest respect to Justice Mohamed, it is not merely the failure to submit a list that triggers the proviso to art 161(2). This is to say, art 161(2) does not simply require the provision of a list. What is required is a list that is not unacceptable to the President. It is the failure "to submit a list as provided for" that can lead to the application of the proviso. So if a list that is unacceptable to the President is provided, then there can be resort to the proviso. By providing as it did in the proviso, the legislature allowed the President the final say to break a deadlock.

As I said in ***Gaskin***, the Constitution by restricting the appointment under the proviso to a judge, provided for the appointment of a professional who is presumptively impartial and fair – qualities that are required and expected in any judge. Thus, the argument on behalf of the applicant that a resort to the proviso means that the "crucial balance at the Elections Commission would be destroyed [and] [m]ore importantly, the Commission and Chairman would not objectively satisfy the constitutional requirement of being able to act with 'impartiality and fairness' as required by art 162 of the Constitution" would mean that the applicant is impugning that which the Constitution itself permits.

In further submissions as regards the issue of impartiality and fairness, the applicant quoted from a 2016 publication of the Commonwealth Secretariat, "Election Management, A Compendium of Commonwealth Good Practice" at p 13 where it is stated that:

> "The election management body must be composed of people who have the confidence of society as a whole. They should command the trust of the political parties, but not necessarily be drawn from them: selfish party interests, as far as possible, must be removed from the process. The mechanism for appointment to the election management body should be designed in such a manner as to achieve these objectives."

This exhortation indicates it is best that an apolitical election management body should be appointed. The fact remains that the Constitution of Guyana provides otherwise given that the political parties are responsible for the appointment of six members of GECOM. It is clear that a serious attempt should be made to change the formula for appointing members of GECOM, though without trust and confidence, it may be that no one would be considered fit and proper or eligible for appointment.

In conclusion on this issue, therefore, the President was entitled to resort to the proviso once he found the list that was submitted to be unacceptable, but whether it was unacceptable would have depended on an objective analysis of the persons thereon according to the criteria set out in the President's letter that a candidate for appointment to the post of Chairman of GECOM should possess.

**Substantive Issue No. 2: Requirement to Give Reasons**

The respondent contends that there is no basis under the Constitution for the President to provide reasons for finding the list and/or persons included therein unacceptable, since there is no duty to state reasons at common law, and that the cases demonstrate that the courts will interfere only where bad reasons have been given. The respondent admits that, over the years, a culture of accountability in the decision-making process has emerged, and that the jurisprudence was well on its way to developing a rule that reasons must be given, as exemplified in ***Padfield v Minister of Agriculture, Food & Fisheries*** **(1968) AC 997**. The respondent has argued, however, that all of the progress has been halted by the decision of the House of Lords in ***R v Secretary of State for Trade & Industry ex parte Lonrho plc*** **[1989] 1 WLR 525**. In support of this argument, the respondent has cited Professor Rose-Marie Belle Antoine in her 1992 article '**A new look at Reasons – One Step Forward – Two Steps Backward**', (Admin Law Review 449) where the learned author criticized the ***Lonrho*** case, saying that it re-establishes the negative common law attitudes towards the giving of reasons in administrative decisions by implying that there can be no positive common law duty to give reasons and that the element of reasons is only instructive where an overwhelmingly strong case has been made. The respondent notes that the arguments in that article echoed the sentiments expressed by the Honourable Justice M.D. Kirby in his 1986 article '**Accountability and the Right to**

**Reasons**', in which Justice Kirby had advanced the positives of giving reasons as a vital tool for fostering good administration.

Despite the reference to these articles, the respondent sought to buttress its argument that reasons need not be given by the President for rejecting the list by contending that in ***R v Licensing Authority for the Western Area ex parte L S Panton Ltd*** **(1970) 15 WIR 380** and the Guyanese case of ***Re Hanoman*** **(1999) 65 WIR 157** the courts demonstrated that they would only interfere where bad reasons had been given. But these authorities demonstrate otherwise and do not support this submission. In ***Panton***, the reasons given disclosed an error of law which deprived the applicant to the hearing to which it was entitled, and so the decision was quashed with Parnell J calling for Parliament to require tribunals to give reasons in the interest of fairness. ***Re Hanoman*** applied the principle of the duty to give reasons in quashing the decision of the Minister of Health to unilaterally appoint members to the Medical Council as being unfair and procedurally improper. Further, in both cases, and also in the abovementioned articles, the judges and authors all expressed the view that reasons ought to be given for decisions made by public authorities.

In relation to the ***Lonrho*** case, it must be highlighted that while the House of Lords did not hold that there is a duty to give reasons, it did emphasize that the courts may interfere where reasons have not been given and it is found by the court that the decision made was not rational. The House of Lords went on to consider the decision of the Secretary of State in that case to determine whether his decision was in fact rational or not. While this case is of course not an authority for a general duty to give reasons, it does indicate that a court can still, in the absence of reasons, examine the decision to determine whether it was rational. In ***Gaskin***, the principle that a decision maker should give reasons for a decision was upheld.

In an attempt to counter the decision in ***Gaskin*** that reasons must be given, the respondent has submitted that this Court is not bound by that decision, since the English common law position is that there is no rule of law which binds one High Court to follow the decision of another of comparable jurisdiction. The respondent submitted that, as a matter of legal comity, High Courts will follow their own previous decisions subject to the exceptions in ***Young v Bristol Aeroplane Co. Ltd.*** **[1944] 1 KB 718**. These exceptions are (i) where the court has to decide which of two conflicting decisions to follow, (ii) where a decision is at variance with a decision of the House of Lords although the former decision has not been overruled and (iii) where a decision was given *per incuriam*. The respondent did not, however, attempt to show that this case falls within any of these three exceptions. And it should be noted that the Court of Appeal recognised the directions of the House of Lords that lower courts were right to follow their previous decisions, and that they "*could take no other course than follow and apply the rule of construction by which, owing to previous decisions of courts of co-ordinate jurisdiction, it was bound*". (p 725.)

In further support of their arguments, the respondent cited cases from High Courts in India and the High Court of Australia where the Courts held that they were not bound to follow the decisions made previously by other High Courts. There are very important distinctions that the respondent failed to draw between the High Courts of those jurisdictions and the High Court of Guyana. In India, there are several High Courts, each presiding and having jurisdiction over a particular state. From ***V.C. Pillai v S. Pillai & others*** **1979 (8) TMI 2000; [1980] 1 SCR 354** cited by the respondent, it is clear that the decision of one High Court in India is not binding precedent on another High Court of a different state, though the High

Court of a particular state is bound by its own decisions, even if made by a different bench or different judges.

The High Court of Australia, which is the final court of appeal in Australia, in ***Imbree v McNeilly*** **[2008] HCA 40** reconfirmed that in appropriate cases it would reconsider earlier decisions of the Court. The position adopted by the Australian High Court is unlike that for the High Courts in India, or for the High Court of Guyana, which is a court of first instance. In ***Velaquez, Ltd. v Commissioners of Inland Revenue*** **[1914] 3 KB 458**, the court held that it was bound by a previous decision of the Court. The Master of Rolls said at p 461:

> *"But there is one rule by which, of course, we are bound to abide – that when there has been a decision of this court upon a question of principle it is not right for this court, whatever its own views may be, to depart from that decision. There would otherwise be no finality in the law. If it is contended that the decision is wrong, then the proper course is to go to the ultimate tribunal, the House of Lords, who have the power to settle the law and hold that the decision which is binding upon us is not good law."*

The House of Lords subsequently, in ***English Scottish & Australian Bank, Ltd. v Commissioners of Inland Revenue*** **[1932] AC 238**, overruled the decision in ***Velaquez*** but, importantly, affirmed the holding of that court that it was bound by its previous decision. This is not, therefore, done as a matter of legal comity, as submitted by the respondent, but rather is the established *stare decisis* principle of law.

Thus, the place where previous decisions may be overturned or departed from is the ultimate tribunal, which has the responsibility for settling the law. The Court of Appeal in Guyana, after the abolition of the Privy Council as the final court of appeal of Guyana and before the acceptance of the Caribbean Court of Justice as the apex court for Guyana, in ***Attorney General v Caterpillar Americas Company*** **GY 1998 CA 7,** held citing ***The State v Gobin & Griffith*** **(1976) 23 WIR 256** that

the final court can depart from previous decisions when it appears right to do so. Justice of Appeal Prem Persaud stated:

> "This is the final court in the country and its decisions must be consistent if they are to be respected and the court held in repute. But that does not mean that if it finds mistakes were made which clearly ought not to have been made, it must shirk its responsibility but it must have the courage to pronounce on them and discharge them."

The submission of the respondent that this Court is not bound by its decision in ***Gaskin*** must, therefore, fail. Even if it were not so bound, this Court would decline to not confirm its decision in ***Gaskin***. To do otherwise would be to rule inconsistently on the same issue within a year. Nothing the respondent has advanced permits such a ruling. Therefore, the President ought to have and should have given reasons for his rejection of the third list submitted by the LOP in order to have properly sought to activate the proviso.

**Substantive Issue No. 3: Failure to Give Reasons**

It was submitted by the respondent that the President did, in his final letter dated October 19, 2017 to the LOP, disclose certain factors upon which the reasonable or rational exercise of his discretion was based in resorting to the proviso, these being that it was done in the "*public interest*" and to avoid "*further delay*". In the event that these are being advanced as the reasons for his decision, it is necessary to determine whether they may satisfy the requirement for reasons in accordance with the ruling in ***Gaskin***. The President made two decisions, the first being to reject the third list submitted by the LOP, and the second being to appoint Justice Patterson pursuant to the proviso. In ***Gaskin*** it was in relation to the decision to reject the second list that it was held that reasons needed to be given. This is because ***Gaskin*** preceded the submission and rejection of the third list and the appointment of Justice Patterson pursuant to the activation of the proviso. Importantly, ***Gaskin***

held that the President must give reasons for exercising his discretion to deem the list unacceptable "*so that he could properly move to apply the proviso...which allows for the appointment of persons from the judicial category only*". Thus, it is the rejection of the list for which reasons are required.

The question, then, is whether the October 19, 2017 letter provided reasons for the rejection of the third list submitted by the LOP. This question may be answered by recalling **art 161(2)** provides that "*if the Leader of the Opposition fails to submit a list* ***as provided for****, the President shall*" resort to the proviso. The list provided for is "*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*". "As provided for" refers to the submission of a list that is:

(i) constituted of six persons;
(ii) not unacceptable to the President

though due to the current composition of the National Assembly there would have been no need for consultations with other non-governmental parties represented therein.

The third list having been submitted by the LOP, the reasons must go towards explaining why this list was found to be unacceptable to the President. The reasons of 'the public interest' and 'to avoid delay' serve to explain why the President may have sought to resort to the proviso and the appointment of Justice Patterson as Chairman of GECOM having rejected the third list submitted by the LOP as being unacceptable. I have therefore concluded that these reasons cannot be referable to explaining the unacceptability of the list and I therefore hold that in effect no reasons for the rejection of the third list were given.

The President also indicated in the said October 19, 2017 letter, that he understood from ***Gaskin*** that reasons were only required where he agreed to the submission of more than one list. In support of this understanding he cited the section of the judgment in ***Gaskin*** which said that persons "*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*". While this was said, the same paragraph also said:

> "*Further and importantly, the exercise of his judgement to reject the list and giving reasons therefor could support the resort to the proviso... .*"

And in a later paragraph:

> "*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... .*"

It is thus clear that the giving of reasons was not held to be required only in relation to the submission of more than one list which was done, but also and **importantly** in relation to resorting to the proviso. The submissions on behalf of the applicant at para 74 were that "the framers of art 161(2) of the Constitution clearly intended the Leader of the Opposition to submit to the President a single list comprising six nominees." The Guyana Bar Association had advanced this submission in ***Gaskin*** a position with which I agreed when I stated that it appears that the Constitution only contemplated the submission of one list. Therefore, the interpretation that the only or main basis for reasons is in relation to the potential submission of another list cannot be supported. ***Gaskin*** clearly establishes that reasons are required so that the President could properly move to apply the proviso.

Likewise, the reference in that final letter to the criteria given in the March 14, 2017 letter cannot be considered as a substitute for reasons for the decision to reject the list as unacceptable. Such criteria may provide the framework against which the persons on the list may be objectively measured, but cannot explain why

one or more of the person(s) or the list may have been found to be unacceptable. The President is required to indicate either specifically or generally the reasons why persons on the list or the list was found by him to be unacceptable in order to justify him rejecting the entire list and resorting to the proviso. There is nothing to suggest that this was done, nor was any submission made by the respondent to so indicate, so it must be concluded that the President has, thus far, failed to give reasons for his decision to reject the list as being unacceptable.

**Substantive Issue No. 4: Whether the appointment of the Chairman of GECOM was unconstitutional and therefore null and void because of Failure to Give Reasons**

In the same way that the Constitution does not expressly provide for the giving of reasons, there is no express guideline as to the effect of the absence of such reasons. As noted above, in ***Lonrho***, the House of Lords held that the "*significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly to a different decision, the decision-maker, who has given no reasons, cannot complain if the court draws the inference that he had no rational reason for his decision*". As referred to earlier, in ***Re Hanoman***, Bernard CJ (as she then was) considered that the absence of reasons for a decision could mean that the decision was unfair or procedurally improper. Chief Justice Bernard cited ***Council of Civil Service Unions v Minister for the Civil Service*** **[1985] 1 AC 374**, where it was held that administrative action is subject to control by judicial review under three heads:

(i) Illegality, where the decision-making authority has been guilty of an error of law;
(ii) Irrationality, where the decision-making authority has acted so unreasonably that no reasonable authority would have made the decision; and
(iii) Procedural impropriety, where the decision-making authority has failed in its duty to act fairly.

The cases thus establish that, in the absence of reasons given for a decision, the court may examine the decision and its context to determine whether judicial intervention is called for.

In this case, as referred to earlier, a framework was provided by the President in the March 14, 2017 letter against which this Court may examine his decision to deem the third list as unacceptable. The six criteria were set out earlier and as I noted then, there is no evidence of a challenge to these criteria.

It is against this framework that the persons submitted by the LOP on the third list are to be examined, using the information known about them according to the curricula vitae exhibited by the applicant which was not challenged by the respondent. The persons on this list are Major General (Rtd) Joseph Singh, Mr. Teni Housty, Mr. Sanjeev Datadin, Ms. Annette Arjoon, Mr. Onesi LaFleur and Mr. Krishndat Persaud comprising both the judicial and non-judicial categories as identified in ***Gaskin***.

**Major General (Rtd.) Joseph Singh**, served as a Special Assistant to the President of Guyana under the two previous governments and under the current government. His vast experience, military credentials and special appointment by different governments suggest that he would be a fit and proper person within the non-judicial category.

**Mr. Teni Housty**, has been a legal practitioner for over 20 years, worked in several countries and has been a Senior Partner in the Law Firm of Fraser, Housty & Yearwood for more than 10 years. He has two Masters degrees in Law and Business Administration, and is a trained and practicing mediator. He also has extensive experience as a consultant for numerous local and international bodies, including for the Ministry of Tourism under both the current and previous

governments. Given his professional record, he would fall to be considered under the judicial category.

**Mr. Sanjeev Datadin**, has also been an attorney-at-law for over 20 years, and possesses a Masters of Laws in International Commercial Law. He has been admitted to practice in multiple Caribbean territories, and also served as legal counsel to the Tribunal established to investigate complaints against the Electoral Commission in Antigua and Barbuda. Locally, he has co-authored Forestry and Anti-Money Laundering legislation enacted in Guyana. His legal experience creates a presumption that he falls into the judicial category of persons.

**Ms. Annette Arjoon**, an aviation pilot and operations manager by profession, has extensive experience in the private sector, in terms of employment, representation and other participation. She has also been a member of multiple public boards and committees, especially in relation to environmental matters. Ms. Arjoon falls into non-judicial category.

**Mr. Onesi La Fleur**, possesses two Bachelors Degrees in Agriculture and Theology, and was scheduled to complete his Master's Degree in Counselling Psychology in December, 2017. In addition to being a former Pastor at the Carmel Seventh-day Adventist Church, Guyana, he also served as the Director of Chaplaincy, Education, Public Affairs & Religious Liberty and Youth Ministries in the Guyana Conference of Seventh-day Adventists while he served as Pastor. His curriculum vitae states that his "*professional and research interests are centred around Pastoral Care and Membership Nurture and Christian Education as a means of Leadership Development, Membership Conservation and Church Growth in the Seventh-day Adventist Church.*" Like Ms. Arjoon, he falls into the non-judicial category.

**Mr. Krishndat Persaud,** was admitted to the English Bar in 1970 and the Guyana Bar one year later, and served as a Magistrate for 23 years before retiring in 2013. He is also a rice miller and farmer. By virtue of his lengthy experience as an attorney-at-law and magistrate, he would fall into the judicial category.

It is against the background of the curricula vitae of these persons that a consideration of the appointment of Justice Patterson has to be assessed. Justice Patterson, having been appointed by the President as Chairman of GECOM, which *ipso facto* means that the President found him acceptable, must have also satisfied the criteria laid out by the President. In that light, the qualification of Justice Patterson to be Chairman of GECOM may be ascertained by examining him against the challenge by the applicant on the basis of the criteria supplied by the President.

It is first necessary to note that Justice Patterson comes under the judicial category of persons, which raises the presumption that he is fit and proper and acceptable for appointment as Chairman of GECOM. In this regard, it is noted that in para 85 of the applicant's submissions, it was stated that Justice Patterson is qualified to be Chairman of GECOM. The applicant, however, has challenged the appointment on three grounds, these being that:

(i) He cannot be considered to have the requisite integrity on the ground that he was not Chief Justice of Grenada, as stated on his curriculum vitae;
(ii) He cannot be or appear to be politically impartial and independent in the discharge of the functions of his office, owing to his appointment by the President to certain positions or bodies, his participation as a pallbearer at the funeral of former President Hugh Desmond Hoyte, and the appearance of his Facebook profile as a member of a group named 'Rally around the People's National Congress' ('PNC'); and
(iii) He is a reverend and Christian activist and therefore offends against one of the qualities stipulated by the President.

I now consider these grounds in turn. However, before doing so I must address a submission on behalf of the applicant which relies on a quote from ***Gaskin*** where I stated that although a person may be a fit and proper person to be appointed s/he may nevertheless be unacceptable because it may be known that the person is not in the best of health or is otherwise unable to withstand the rigours of being Chairman of GECOM. It was thus canvassed at para 85 (as referred to above) that "by the Court's own standards, Reverend Justice Patterson is unfit and improper, though qualified, to be a Chairman of GECOM and for the other reasons adumbrated above." But the applicant has adduced no evidence to indicate that Justice Patterson is not in the best of health or unable to withstand the rigours of being Chairman of GECOM.

The applicant has focused his argument on the lack of evidence supporting the appointment of Justice Patterson as Chief Justice of Grenada to argue that this impugns his credibility and integrity. The respondent has responded to the first ground by indicating that Justice Patterson served as acting Chief Justice of Grenada, and exhibited several exhibits which referred to him as such. This evidence does indicate that Justice Patterson acted in such a capacity, which is not dissimilar from the persons who acted as Chief Justice and Chancellor in Guyana for more than a decade – a notorious fact. Justice Patterson's curriculum vitae indicates that as a part of his "Legal Experience" he was Chief Justice of Grenada in 1987, and if he acted in that capacity in that year, as indicated by the evidence which I accept and have no reason to doubt, this cannot be seen as impugning his integrity in the manner suggested by the applicant. This ground must, therefore, fail.

The second ground, which seeks to challenge Justice Patterson's ability to be impartial and independent, is based on three observations by the applicant. The

first is that Justice Patterson was appointed by the President to serve as an advisor in different ways and also on a Commission of Inquiry. Once again, the respondent has highlighted that the LOP had also submitted persons who served in similar capacities, such as Major General (Ret'd) Joseph Singh whose curriculum vitae indicates that at the time of his nomination by the LOP he was an advisor to the President Granger. Although the other lists submitted by the LOP are not up for consideration for the reasons outlined earlier, I nevertheless mention two persons from the first list to highlight the inconsistency in the applicant's contentions. The applicant, in promoting Major General (Ret'd) Norman McLean and Mr. Christopher Ram on this earlier list seems to discount their appointments as advisors to the past and current governments. Like Justice Patterson, Mr. McLean was also Chairman of Board of Inquiry into prison disturbances. In the case of Mr. Ram, the applicant has not challenged the evidence that he was an advisor to the current Attorney-General. Ms. Arjoon's curriculum vitae also discloses under the heading 'Public Service' that she has been a member of a number of public bodies. This all suggests a lack of consistency in the argument for the applicant, even indicating that it is unmeritorious and therefore untenable. The curricula vitae of nominees of the LOP, as evidenced in the application, indicate that on the applicant's side there is a recognition that appointment to serve on public bodies or in the public service (meaning in the service of the public) does not *ipso facto* negate a person's ability to serve a Chairman of GECOM. So this limb of the applicant's case has no merit.

The second observation in relation to this aspect of the applicant's challenge is that Justice Patterson is affiliated with the political party, the PNC, because he was a pall bearer "at a political segment" of the late President Hoyte's funeral. Apart from a lack of clarity in what is meant by "a political segment" of the funeral, this

objection is disingenuous and may even be considered ludicrous, suggesting as it does that paying respects to a departed colleague, friend or relative would mean that one subscribes to the political views and affiliations of the deceased. In this regard, it is noted, from a document exhibited by the applicant, that the Honourable Khemraj Ramjattan then member of the PPP at the time of Mr. Hoyte's funeral (a notorious fact), was also a pall bearer. Mr. Jagdeo, now LOP and then President of Guyana made remarks. They paid their respects. It is therefore difficult to see how the applicant could seek to use this example in this light, but suffice it to say that this cannot in any way lead to a conclusion that Justice Patterson was or is affiliated with the PNC of which the President is leader or that it impugns his integrity. This submission cannot therefore be sustained.

Finally, the alleged membership of the Facebook group cannot in any way be accepted by this Court as evidence of an alliance with the PNC or any political party. It is common knowledge, in this technological age, that one cannot necessarily control one's appearance on social media sites. The exhibit discloses that Justice Patterson was added by one Sheldon Britton on January 22, 2016. There is no explanation in the applicant's affidavit about this. There is no evidence that Justice Patterson ever acknowledged such addition or participated in any way in the activities on this Facebook page, whether or not it is an official page of the PNC. Therefore, I do not accept the applicant's contentions on this ground as a valid basis for challenging Justice Patterson's appointment. The second limb of this aspect of the applicant's challenge fails.

The third limb of this ground can be disposed of thus: Justice Patterson's curriculum vitae states that he served as a pastor and as a chairman of a local church body. Similarly, Mr. La Fleur, a nominee on the third list, has been a pastor and has held a senior position within his church. The applicant himself has cast a

shadow on Mr. La Fleur's suitability by labelling Justice Patterson, who appears to have significantly less experience in religious bodies and work, as a Christian activist and thus unsuitable for the post of Chairman of GECOM. The respondent has highlighted that the naming of Mr. La Fleur by the LOP is not consistent with a submission that Justice Patterson is unfit because of his religious training and involvement. It does appear that when compared to Mr. La Fleur, who the exhibited curriculum vitae reveals, is currently an active religious leader, Justice Patterson's experience as a religious leader appears to pale in comparison. Additionally, there is no evidence that Justice Patterson is currently a religious leader or activist. As such, apart from the lack of evidence to which I just referred, by the submissions on his behalf, the applicant himself has disqualified Mr. La Fleur and has defeated his argument on this limb which I therefore consider to have no merit.

In light of the foregoing, even in the absence of reasons, it is difficult for this Court to conclude that the President's decision to reject the list as being unacceptable was either illegal or irrational bearing in mind the decision in ***Gaskin*** that the President could, in the exercise of his discretion, reject the entire list as unacceptable if even one person was found to be unacceptable. The applicant by his contentions has lent to the view that more than one of the LOP's nominees was unacceptable. Thus, the absence of reasons, whether specific or general, from the President, as to why the list was rejected would not vitiate his decision to reject the list and resort to the proviso. Concomitantly, in the circumstances it would be a stretch to deem the appointment of Justice Patterson pursuant to **art 161(2)** as being unconstitutional because of the absence of reasons for the rejection of the third list.

Finally, though not necessary for adjudication in light of my decisions as outlined above, for completeness I consider the contention of the applicant that this Court

grant "An Order directing His Excellency, President David Arthur Granger to choose a person from the eighteen (18) names submitted to him by the Leader of the Opposition". The short answer to this contention is that to do so would be for this Court to usurp the authority given to the President by the Constitution. The discretion to accept or reject a list and by extension the discretion to appoint one of the nominees on the list submitted pursuant to **art 161(2)** lies with the President. As held in ***Lonrhro:***

> "There is a danger of judges wrongly though unconsciously substituting their own views for the views of the decision-maker who alone is charged and authorised by Parliament to exercise a discretion. The question is not whether the Secretary of State came to a correct solution or to a conclusion which meets with the court's approval but whether the discretion was properly exercised."

A similar conclusion was arrived at in ***Re Blake*** **(1994) 47 WIR 175** at 183 where Sir Vincent Floissac CJ held that even if the court could have enquired into the decision made by the Governor-General to appoint the Prime Minister, the order of mandamus that was sought "could not have been made because such an order would have gone beyond the bounds of judicial review. A court (hearing an application for judicial review of the decision of a public authority) is not empowered to usurp the powers of the authority which is the constitutionally, statutorily or legally authorised decision-maker."

The President is authorised by the Constitution to exercise a discretion, and even if found to have been exercised unlawfully, a Court cannot substitute its own view of what should be done. To do so would mean that this Court would be deciding that the third or any list is "not unacceptable" a discretion that pursuant to the Constitution, lies in the President and not the Court.

**Conclusion**

In conclusion, I hold that there is nothing before this Court to permit a finding that the President acted unlawfully or irrationally in resorting to the proviso to **art 161(2)**, or to rebut the presumption that Justice Patterson is qualified to be appointed to the post of Chairman of GECOM. So as regards the reliefs claimed I hold as follows:

1. For a Declaration that the appointment of Reverend Justice (ret'd) James Aloysius Patterson by His Excellency President David Arthur Granger on the 19th day of October, 2017 as the Chairman of the Guyana Elections Commission is in violation of and contrary to Article 161(2) of the Constitution of the Co-operative Republic of Guyana and is accordingly unlawful, illegal, unconstitutional, null, void and of no effect - this declaration is refused. As stated above, while consensus is desired, for the reasons given, the Constitution does permit a unilateral decision to appoint a Chairman of GECOM on the rejection of the list submitted by the LOP.

2. For a Declaration that the Reverend Justice (ret'd) James Aloysius Patterson is not qualified to be appointed as the Chairman of GECOM in accordance with and in pursuance to Article 161(2) of the Constitution of the Cooperative Republic of Guyana - this declaration is refused as the evidence produced does not permit such a finding.

3. An Order directing His Excellency, President David Arthur Granger to choose a person from the eighteen (18) names submitted to him by the Leader of the Opposition - this is refused. Such refusal is a consequence of my decisions at (1) and (2) above and because of my decision that the only list relevant to this application is the third list. In any event as stated, even if I had found in favour of the applicant, it would not have been permissible for this Court to usurp the function of the President by directing him to choose a nominee from the third or any list.

4. For an Order rescinding, revoking, cancelling and setting aside the appointment of Reverend Justice (ret'd) James Aloysius Patterson by His Excellency President David Arthur Granger on the 19th day of October, 2017

as the Chairman of the Guyana Elections Commission. As a consequence of the reasons outlined and the above decisions, this order is refused.

The application is therefore dismissed as being wholly misconceived with costs to the respondent in the sum of $250,000.

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Roxane George
Chief Justice (ag)
June 8, 2017