2019-HC-Dem-Civ-FDA-19

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

REGULAR JURISDICTION

PROCEEDINGS FOR RELIEF UNDER THE CONSTITUTION

COMPTON HERBERT REID

Applicant

v

1. **DR BARTON SCOTLAND, Speaker of the National Assembly**
2. **CHARRANDASS PERSAUD**
3. **THE ATTORNEY GENERAL**

Respondents

4. **MR. BHARRAT JAGDEO, Leader of the Opposition**

First added party

5. **MR. JOSEPH HARMON, Minister of State representing A Partnership for National Unity**

Second added party

Jan. 15, 24, 31, 2019.

Mr. Neil Boston SC, with Mr. Rex McKay SC, Mr. Robert Corbin and Ms. Bettina Glasford, for the applicant.

Mr. Rafiq Khan SC, for the first respondent.

Mr. Sanjeev Datadin with Mr. Ganesh Hira for the second respondent.

Mr. Basil Williams SC, Mr. Maxwell Edwards and Mr. Mayo Robertson for the third respondent.

Mr. Mohabir A. Nandlall, Mr. C.V. Satram, Mr. Sase Gunraj, Mr. E. Gomes, Mrs. M. Nadir-Sharma, Mr. M. Narayan and Mr. R. Jaigobin for the first added party.

Mr. Roysdale Forde, Mr. S. Lewis and Ms. O. Joseph for the second added party.

CORAM: ROXANE GEORGE, CHIEF JUSTICE (ag)

JUDGMENT OF THE COURT

Background and Introduction

1. The Constitution of the Co-operative Republic of Guyana provides in **art 51** that:

> "51. There shall be a Parliament of Guyana, which shall consist of the President and the National Assembly."

2. **Article 52** of the Constitution provides that the National Assembly shall comprise of such number of members as determined by the Assembly, and subject to the Constitution, in accordance with any law made by Parliament. **Section 11A** of the **Representation of the People Act, Chapter 1:03** provides that the National Assembly is comprised of at least 65 Members of Parliament (MPs).

3. The Government of Guyana comprises a coalition made up of A Partnership for National Unity (APNU) and the Alliance for Change (AFC). The current National Assembly is comprised of 65 MPs of which 33 MPs are for the Government and 32 for the Opposition. Mr. Charrandass Persaud, the second respondent, was an MP representing the list that formed the government, that is, the APNU+AFC List. The Opposition moved a no confidence motion (NCM) in the government which came up for debate on December 21st 2018. At the conclusion of the debate a vote was taken by way of division of the House. The second respondent voted against the government and in favour of the NCM so that the vote was 33 in favour of the motion and 32 against.

4. There has been much debate and contention since regarding whether the division of votes as recorded and confirmed by the Speaker of the National Assembly, who is the third respondent, as Resolution No. 101 which was also subsequently confirmed by letter to the Party Whips by the Clerk to the National Assembly, permitted the Government to be defeated.

5. These circumstances led to the filing of this fixed date application (FDA) by Mr. Reid (Reid) who deposed that he is a citizen of Guyana and a registered elector entitled to vote in national and regional elections, and farmer by profession. Reid deposed that the Mr. Persaud had violated **arts 155 (1)(a)** and **156 (3)** of the Constitution of Guyana in that he on the date of the

NCM was a dual citizen of Guyana and Canada and because he voted against the list he was elected to represent so that his vote was invalid and the NCM would thereby not have been carried. Reid seeks a number of declarations and orders as follows:

(1) A declaration that the second respondent, Charrandass Persaud, is not qualified for election as a member of the National Assembly by virtue of his own act and acknowledgement of allegiance, obedience and adherence to a foreign power to wit, the Sovereign State of Canada, in contravention of Article 155 (1) (a) of the Constitution of Guyana.

(2) A declaration that the second respondent, Charrandass Persaud, was on the 7th April, 2015 disqualified from being nominated as a member of the National Assembly of the Republic of Guyana.

(3) A declaration that the nomination of the second respondent on the 7th April 2015, as a candidate for the APNU+AFC List of Candidates in the Geographic List for Region No. 6, is invalid, null and void and of no legal effect.

(4) A declaration that Charrandass Persaud is a citizen of Canada and is the holder of a valid Canadian passport No. AC773625 issued by the Government of Canada on the 25th October 2017, which will expire on the 25th October 2022 and was a replacement of the previous passport No. JX818124, which was issued to the second respondent on 29th January 2013 and expired on 29th January 2018.

(5) A declaration that the second respondent who was not qualified for election as a member of the National Assembly at the General Elections held on 11th May 2015, was not, on the 21st December 2018, qualified to vote as a member of the National Assembly.

(6) A declaration that the vote cast by the second respondent on the 21st December 2018 in the National Assembly in favour of the vote of No Confidence was null, void and of no legal effect.

(7) A declaration that by reason of the unlawful 'Yes' vote cast by the second respondent, the No Confidence vote was not passed.

(8) An order setting aside the order of the Speaker that the No Confidence Motion, Resolution No.101, was passed by the National Assembly on the 21st December, 2018.

(9) (a) An Order staying the enforcement of Resolution No. 101 declared by the Clerk of the National Assembly to have been passed in the National Assembly on December 21st, 2018.

(b) A conservatory order, preserving the *status quo ante* that the Government remains in office until the hearing and determination of the reliefs sought herein.

Issues to be decided

6. Based on the submissions, the following are the issues to be determined:

a) Does this Court have jurisdiction to entertain this FDA;

b) Does the second respondent have dual citizenship and if so, would he be qualified for nomination to the National Assembly

c) If the second respondent has dual citizenship, what is the effect of this on his vote on the NCM;

d) What is the status of the second respondent's vote against the list which he was elected to represent in the National Assembly;

e) Given the determinations on the above, was the NCM either a nullity or was it defeated.

7. Based on these same facts, the issue regarding whether the NCM is valid given the division of the House and whether and when the Cabinet should resign are the subjects of two other applications: 2019-HC-Dem-Civ-FDA-22, **Attorney-General v The Leader of the Opposition and the Speaker of the National Assembly** and 2019-HC-Dem-Civ-FDA-29, **Ram v Attorney-General & The Leader of the Opposition**, the decisions for which will be given shortly.

Case management directions

8. The Leader of the Opposition, Mr. Bharrat Jagdeo, representing the Opposition Peoples' Progressive Party/Civic, and then the Minister of State, Mr. Joseph Harmon, representing APNU

applied for and were granted permission to be added as parties because they are representatives of political parties in the National Assembly which both have an interest in these proceedings.

9. Mr. Saphier Hussain, Attorney-at-law, who represented himself, as the leader of the National Independent Party, also sought to be added as an interested party in order to raise a point *in limine*. His application was not allowed as I was of the view that his grounds that he is the leader of a political party, that he has contested past national elections and secured votes and that he is a potential candidate for any upcoming general elections, did not disclose a sufficient interest for him to be so joined. In addition, he sought to raise the issue of the jurisdiction of the Court to hear this application which as I pointed out to him was already being advanced by counsel on behalf of the second respondent.

10. The second respondent was ordered to be served by way of email and courier service. It was ordered that he respond by email to the lawyers for the applicant and the Registrar of the Supreme Court. He clearly was served pursuant to **Part 63.02 (1) of the Civil Procedure Rules** (CPR) since Mr. Datadin filed a Notice of Appointment of Attorney-at-law on his behalf. In addition, through his lawyer, the second respondent filed an application to challenge the jurisdiction of the Court to hear the FDA. Thus, the second respondent is deemed to have been served with this application.

11. Reid filed an application to have this application filed by the second respondent struck out for non-compliance with the CPR in that the notice of appointment of attorney-at-law had not been served as required by **Part 63.02(1)** and because Ms. Anisa Chow who deposed that she was counsel and agent for the Mr. Persaud had sworn to the affidavit in support of the application to strike out. Mr. Boston abandoned the first ground of the application to strike out as the notice of appointment of attorney-at-law had been served and filed. An affidavit of service evidencing this was filed on behalf of the second respondent. Even without Reid's application to strike out, I had concluded that Ms. Chow's affidavit had to be struck out because as his lawyer she swore to the affidavit in support of the application when this is prohibited by **Part 30.01 (2)** of the CPR. Further, while deposing that she was his agent, no documentary proof of such in the form of a power of attorney (POA) was exhibited. Mr. Datadin disclosed to the Court that a POA had been prepared but had not as yet been filed.

12. I was of the view that the application itself which was signed by Mr. Datadin could nevertheless have been maintained without an affidavit as it was stated that the application was

going to be made orally. In any event, the issue being raised is a purely legal one, that is, whether this court has jurisdiction to entertain Reid's FDA. Since a Court must always ensure that it has jurisdiction, this issue could have been raised without a formal application. As such, I ruled that submissions could be made on behalf of the second respondent in support of his application. I should note here that apart from not filing an affidavit in defence, by this application the second respondent was not disputing the facts as outlined in Reid's FDA for it was stated in para 9 of the grounds for this application that: "The Applicant [Mr. Persaud] wishes to rely on no issue of fact and relies on the facts raised by the respondent [who would be Reid] and matters of law."

13. An application was made by Reid for a conservatory order to maintain the status quo as obtained before the NCM. The reasons given were that the State would expend significant financial resources to prepare for the holding of General and Regional Elections which may be wasted if during the preparations the Court rules in his favour; and that the preservation of the status quo would protect the rights of citizens who voted at the 2015 elections for the government to be in office for five years to implement a promised manifesto. Apart from the fact that I did not find that these reasons were sufficient to warrant such an order, I also considered that given the nature of the proceedings it would be best to expedite the hearing of the FDA so that there would have been no need for such an order. Mr. Boston therefore indicated that since there would be a ruling within a short timeframe they would not be pursuing this application.

14. Thereafter submissions were invited from the parties to the proceedings to be served and filed within short timeframes given the national importance of the application. Mr. Khan on behalf of the Speaker of National Assembly indicated to the Court that the Speaker would abide by the Court's decision. An affidavit in defence filed by the Speaker had so indicated. In this affidavit the Speaker had this to say:

> "1. I am the Speaker of the National Assembly and have served in that position since May, 2015. … .
> 2. In my capacity of Speaker I am the spokesperson and representative of the National Assembly. I preside over all debates and apply and enforce observance of the Rules, Procedures and Practices of the National Assembly.
> 3. On 21st December, 2018 I presided over the debate on the no confidence motion by the Leader of the Opposition.
> 4. At the conclusion of the debate the motion was put and by a collection of voices, as is the accepted practice, the motion was declared lost.

5. On a request by Ms. Gail Texeira a member of the opposition a division was called and by a count of votes the result was declared 33 to 32 in favour of the motion.
6. I shall abide by any order the Court may make in these proceedings. ..."

Jurisdiction

Submissions on Jurisdiction

15. The submissions on behalf of the second respondent and Mr. Jagdeo were similar, that this Court has no jurisdiction to grant the reliefs sought because art 163 of the Constitution, in conjunction with **National Assembly (Validity of Elections) Act, Chapter 1:04**, (**Chapter 1:04**) sets out the method and timeframe for approaching the High Court to challenge the eligibility and election of an elected MP. It was contended that the Court lacks jurisdiction because this application amounts to an attack on the election of the second respondent which is only permissible by way of election petition within twenty-eight days of the official declaration of the results of the election pursuant to **art 163(4)** and **secs 3 and 5(1)** of **Chapter 1:04** and **Rule 3** of the **National Assembly (Validity of Elections) Rules** as appended to the Act.

16. Mr. Datadin also submitted that it is a notorious public fact that the second respondent is no longer a member of the National Assembly, he having been removed and replaced by Ms. Barbara Pilgrim on 3rd January, 2019, a day before this FDA was filed. As such he contends this leaves no live issue for consideration and ruling by this Court. Both Mr. Datadin and Mr. Nandlall further submitted that art 165(2) of the Constitution conclusively deals with the effect of the second respondent's vote i.e. that even if he was unqualified to be elected the proceedings in which he voted were not nullified. Mr. Datadin also advanced that this Court cannot inquire into what takes place in Parliament except where there has been unconstitutional conduct. **AG v Trotman & Ors** HCA 216/W 2012 per Chang CJ (ag) and **Fotofolli & Ors v The State** [1988] LRC (Const) 102 were cited. Further, he said, the Court may not make declaratory orders in relation to the conduct of matters in Parliament, moreso as the Court must respect Parliamentary sovereignty and not interfere in Parliament's activities and votes.

17. As regards the issue of dual citizenship, Mr. Datadin stated that in the context of this case this would amount to a challenge to the validity of the election of the second respondent as an MP which could only be done by way of petition within twenty-eight days of the declaration of the election results. In addition, the Constitution did not invalidate the MP's vote but merely provided for a penalty in **art 58** of $50.00 per day for anyone who continues to sit in the National

Assembly while disqualified. As such, in the absence of specific provision nullifying such an MP's vote, and given the provision for a penalty as provided for in **art 58**, coupled with the effect of **art 165(2)**, the vote by the second respondent cannot be impugned.

18. The submissions on behalf of Reid and the Attorney General (AG) were very similar with the latter stating that the submissions made on behalf of Reid were adopted. Submissions on behalf of Mr. Harmon on this issue mirrored the submissions of these two parties. These submissions assert that there was unconstitutional conduct on the part of the second respondent when he participated and voted despite his dual citizenship and his decision to disavow the list he represented in the National Assembly. Thus, based on these facts, prima facie, this issue of the constitutionality of the second respondent's conduct in the National Assembly falls to be considered.

19. It is their contention that **Chapter 1:04** cannot be interpreted in a way that ousts the exclusive jurisdiction of the High Court as granted by art. 163. It was submitted that only those circumstances that are proximate to the elections would fall for the application of **Chapter 1:04**. Thus, for example, where there is an issue of a vacant seat in the National Assembly pursuant to **art 163(1)(b)(iii)**; or whether pursuant to **arts 156(2)(3)** and **163 (1)(b) (iv)** an MP is required to cease to exercise his or her functions as a result of a conviction or being of unsound mind, or as a result of a declaration of non-support for his or her list, these would not fall within the parameters of an election petition which has to be filed within twenty-eight days. It was further submitted that the language of **s 3** of **Chapter 1:04** is directory and not mandatory since it states that a challenge to an election 'may' be instituted by way of a petition so that such a challenge can be commenced by some other originating process.

20. On behalf of Mr. Harmon an additional reason for this Court accepting jurisdiction was advanced that **s 43** of **Chapter 1:04** provides for the determination of 'vacancy disputes' which means that such a dispute which is presented to the Court by way of a vacancy petition does not and cannot sensibly be subjected to any time restriction for the institution of the vacancy petition. Therefore there is a jurisdiction that exists beyond 28 days in respect of an election petition to challenge an unqualified person's election to the National Assembly. Section 43 provides:

> "43. Any such question as is referred to in sub-paragraphs (iii) and (iv) of paragraph (b) or in paragraph (c) of article 163 (1) of the Constitution may, in respect of a seat to which an election under article 60 (2) is

applicable, be referred to the Court, and shall thereupon be determined by it in accordance with the provisions of sections 181 to 187 (inclusive) of the Local Authorities (Elections) Act, which shall apply for that purpose with such modifications, adaptations, qualifications and exceptions as may be necessary."

21. It was also submitted that since the provisions of the Constitution have been breached by the participation of the second respondent who they contend did so illegally, by voting while disqualified, thereby causing a breach of **art 106 (6)** which resulted in an abridgment of the five year life of the Government, then the Court has an inherent right to adjudicate thereon. It was advanced that when the Speaker accepted the second respondent's vote he exceeded his powers in breach of the Constitution, that is, the acceptance of this vote amounted to a breach of the Constitution. The contention is that it would be absurd to permit such an illegality to be perpetuated in "flagrant breach of the Constitution" resulting in an unconstitutional act by the National Assembly remaining valid.

22. While the submissions on behalf of Reid and the AG were that the NCM proceeding was valid and that it was the second respondent's vote that was invalid as being in breach of the Constitution, those by Mr. Forde submitted on behalf of Mr. Harmon were that the entire NCM proceeding was invalid as being unconstitutional as it included the participation of the second respondent.

23. Another contention was that the FDA seeks an order in circumstances that were only known subsequent to the expiration of the time limited by **s 5** of **Chapter 1:04** and seeks to move the court's inherent jurisdiction to consider breaches of the Constitution where the mode to commence an enquiry of such a breach is not provided for in the Constitution. As pointed out by Mr. Nandlall, there is no evidence in the affidavits in support that it was unknown that the second respondent was a dual citizen before the December 21st 2018 sitting of the National Assembly. Despite this, the Court is being asked to agree that notwithstanding the ability to move the Court on a matter such as this by election petition, that failure to do so is not a fatal defect and that the Court is empowered to hear this application as an application for a administrative order simpliciter rather than as an election petition. It was therefore submitted that these issues turned on the interpretation and application of the relevant provisions of the Constitution and that applying **AG of Guyana v Trotman & Granger** 19/2012M and **AG for**

St. Christopher and Nevis v Hon Sam Condor and Hon. Shawn K. Richards and The Rt Hon Dr. Denzil L. Douglas, Prime Minister v Hon. Sam Condor and Hon. Shawn K. Richards SKBHCVAP2013/0005 &0006 April 17, 2015 CA ECSC (**Sam Condor**) the Court can enquire into the Parliamentary proceeding where there is evidence of unconstitutionality.

24. Thus, it was asserted, by these counsel that the FDA is not an election petition but an application for constitutional relief which is also to be viewed as public interest litigation as contemplated by Jamadar JA giving the judgment of the Court in **Dumas v AG of Trinidad and Tobago** Civ App No. P218/2014. Therefore it was argued, this Court, as the ultimate guardian and interpreter of the Constitution, should exercise its jurisdiction to adjudicate in this application.

Learning and conclusions on jurisdiction

25. Article 163(1) of the Constitution clearly grants the High Court jurisdiction to determine whether a person is eligible to be a Member of Parliament. Article 163 as is relevant to this case states:

> "163 (1) Subject to the provisions of this article, the High Court shall have exclusive jurisdiction to determine any question –
>
> (a) regarding the qualification of any person to be elected as a member of the National Assembly;
>
> (b) whether -
>
> ...
>
> (iv) any member of the Assembly is required under the provisions of article 156(2) and (3) to cease to exercise any of his or her functions as a member thereof;
>
> (c) regarding filing of a vacant seat in the Assembly; or
>
> (d) whether any person has been validly elected as Speaker of the Assembly from among the persons who are not members thereof or having been so elected, has vacated the office of Speaker."
>
> (2) Proceedings for the determination of any question referred to in the preceding paragraph **may** be instituted by any person (including the Attorney General) and, where such proceedings are instituted by a person other than the Attorney General, the Attorney General if he or she is not a party thereto may intervene and (if he or she intervenes) may appear or be represented therein.
>
> ...

(4) Parliament may make provision with respect to –

(a) the circumstances and manner in which and the conditions upon which proceedings for the determination of any question under this article **may** be instituted in the High Court and an appeal may be brought to the Court of Appeal in respect thereof;

(b) the consequences of the determination of any question under this article and the powers of the High Court in relation to the determination of any such question, including (without prejudice to the generality of the foregoing power) provision empowering the High Court to order the holding of a fresh election throughout Guyana or a fresh ballot in any part thereof or the re-allocation of seats in whole or in part; and

(c) the practice and procedure of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article and of that Court and the Court of Appeal in relation to appeals to the Court of Appeal under this article,

and subject to any provision so made, provision may be made with respect to the matters aforesaid by rules of court.

(5) In this article reference to any person being elected shall be read and construed as a reference to any person being elected under paragraph (2) of article 60 or under article 160(2), as the case may be." (Emphasis mine.)

Article 60 provides for the electoral system by way of proportional representation. **Article 160 (2)** provides for the determination of the elections according to the allocation of geographical and non-geographical representatives or MPs in the National Assembly.

26. **Chapter 1:04** provides for the provisions that Parliament has made in order to give effect to **art 163**. **Section 3** of **Chapter 1:04** states:

"3. (1) Any question referred to in article 163 (1) (a) [qualification to be elected] (b) [whether election lawfully conducted; lawful allocation of seats; whether seat has become vacant & ceasing to be a member per art 156 (2) &(3)] and (c) [filling of a vacant seat in the National Assembly] of the Constitution **may**, in respect of an election referred to in article 60(2) of the Constitution and with a view to securing appropriate remedial orders,

be referred to the Court and shall thereupon be determined by it, in accordance with this Act.

(2) Every reference **shall** be by a petition (hereinafter referred to as an election petition) presented to the Court in accordance with this Act." (Emphasis mine.)

Section 5(1) of **Chapter 1:04** provides that:

"5. (1) Subject to this section, an **election petition shall be presented within twenty-eight days after the results of the election** out of which the matter in question on the petition arose are **published** in the Gazette under section 99 of the Representation of the People Act." (Emphasis mine.)

Rule 3(1) of the **National Assembly (Validity of Elections) Rules** provides:

"(1) Except by way of an election petition for redress in conformity with the Act, there shall be no reference to the Court of any question regarding the qualifications of any person to be elected as a member of the National Assembly, or whether the result of an election may have or has been affected by any unlawful act or omission, or whether the seats in the Assembly have been lawfully allocated, or whether any election the results whereof are declared by the Elections Commission in pursuance of section 99 of the Representation of the People Act has been lawfully conducted.

(2) An election petition shall be in Form 1 and shall contain the particulars required in the Form."

27. The authorities on the application of these provisions regarding challenges to elections are legion. They establish that where it is sought to nullify the election of an MP, as provided for in the Constitution and **Chapter 1:04**, compliance with the provisions to do so are mandatory, that is by petition within twenty-eight days of the official declaration of the elections results. I need look no further than to Guyanese cases which over the years have confirmed that the procedure to challenge the election of an MP is to be adhered to strictly. The Guyanese cases of **Gladys Petrie & Ors v AG & Ors** (1968) 14 WIR 292 and **Seecomar Singh & Anor v R C Butler** (1973) 21 WIR 34, **Payne v Hammond et al** 206/1986 D'ra (Unrep), **Esther Perreira v The Chief Elections Officer**, 36P/1998 D'ra, **Delph v Chief Elections Officer** [2003-2004 GLR 29 and **Melville v Chief Elections Officer et al** 464P/2006 all confirm that these provisions must be strictly complied with.

28. I quote from two of these cases to illustrate how the jurisdiction of the High Court in election cases comes to be invoked. In **Petrie**, Bollers CJ traced the history of the jurisdiction of

the Court in election matters. In holding that such challenges must be by way of election petition after an election His Honour discussed **art 71** of the **1966 Constitution**, now **art 163** of the Constitution, and had this to say about the jurisdiction of the High Court regarding challenges to elections (p 299 B and 304F):

> "On an analysis of the article in relation to the matters which concern us here, it is clear that Parliament is here conferring an exclusive jurisdiction on the High Court to determine certain questions. These questions centre around the qualifications of any person to be elected as a member of the National Assembly, whether generally or in any particular place, an election has been lawfully conducted or the result of an election affected, whether the seats in the Assembly have been lawfully allocated or a seat has become vacant or any member of the Assembly is required to cease to exercise any of his functions as a member, regarding the filling of a vacancy or whether any person has been validly elected as Speaker.
>
> ...
>
> I reject the submission of counsel for the plaintiffs, unsupported as it was by authority or analogy, that the court in its general jurisdiction at common law would have jurisdiction in these matters. I think that the history of this special jurisdiction, which is conferred on the High Court by art 71, indicates clearly that the court never had such a jurisdiction at common law, nor can it be said that the summons raises the specific question as to the interpretation of the Constitution."

29. In **Payne & Anor v Hammond & Ors** (No. 206 of 1986 Demerara) K. George, CJ, as he then was, in holding that the provisions of disputed election laws are mandatory and must be complied with, at p 16 of the judgment referred to the case of **Jyote Basu v Debi Ghosai** (1982) 3 SCR 318 where Chinnappa Reddy J said at pp 326 – 327:

> "'An election petition is not an action at common law or in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply, but only those rules which the statute makes and applies. It is a special jurisdiction and a special jurisdiction always has to be exercised in accordance with the statute creating it.

Concepts familiar to the common law and equity must remain strangers to the election law unless statutorily embodied. A court has no right to resort to them in considerations of alleged policy because policy in such matters as those relating to the trial of election disputes is what the statute lays down.'"

30. Chief Justice George then concluded at p 20 of the judgment:

> "The insistence on rigid adherence to the statutory provisions whether it be as to time for doing or the manner in which an act should be done is one of the peculiar and distinguishing features of disputed election laws. Not only is the time frame within which election petitions should be filed considered a period of limitation and non adherence fatal to its prosecution, but failure to comply with any of the statutory requirements leads to a similar result."

31. The case of **Parry and Brantley Benjamin et al and Brantley Daniel and Brantley**, Civil Appeal No. 3 of 2012; Civil Appeal No. 4 of 2012; Civil Appeal No. 5 of 2012 ECSC, was cited for the contention that constitutional issues can be raised in an election petition as one proceeding. However, this case can be distinguished as it was one in which an election petition was filed and as part of the grounds for the challenge was the contention that there was a breach of the petitioners constitutional rights. This is not the case at bar as an election petition is not before this court.

32. I now highlight two cases from the Eastern Caribbean where the issue was whether a challenge to the qualification of an elected candidate could be brought pursuant to the CPR. In **Elsroy Nathaniel Dorset** v **G.A Dwyer Astaphan and Ors, Claim No. SKBCV 2007/0259**, a decision of **Belle J** sitting in the Eastern Caribbean Supreme Court in the High Court of Justice, Federation of St. Christopher and Nevis, the claimant filed a fixed date claim, which is equivalent to our FDA, seeking various constitutional reliefs against the defendants touching and concerning the qualification of the first named defendant to sit in the National Assembly of St. Christopher and Nevis. Those proceedings were instituted on the 31st August, 2007. The general election in St. Christopher and Nevis was held on the 23rd October, 2004. The defendants filed applications to strike out the proceedings on grounds similar to those which are raised in the case at bar. Section 23 of the National Assembly Election Act of St. Christopher and Nevis prescribed

a time limit of 21 days within which an Elections Petition may be filed to challenge the qualification of a member of the National Assembly to be elected thereto.

33. The Court held that the fixed date claim filed by the Claimant was "procedurally incurably bad and misconceived." The Court found that the correct procedure to be used to challenge the qualification of a member of the National Assembly was to file an elections petition as is required by the provisions of the Constitution and the National Assembly Elections Act of St. Christopher and Nevis, the relevant provisions of which are in *pari materia* to our provisions.

34. In **Attorney General of Grenada v Peter Charles David** *(GDAHCV 2006/0018, 12th September 2006)*, the respondent was elected to the House of Representatives on 27th November 2003. On 12th January 2006, the Attorney General filed a fixed date claim form seeking a declaration that the respondent, a Canadian citizen, was "ineligible to be nominated as a candidate" because he was, by virtue of his own act under acknowledgement of allegiance to a foreign state, a declaration that his nomination was invalid and a further declaration that his election was invalid." The court held that seeking to challenge the validity of the respondent's election other than by an election petition brought in accordance with the Representation of the People Act was an abuse of process of the court. Benjamin, J, as he then was, said (at paragraph 34):

> "It is of significance that the scheme devised by sections 97 -100 of the RPA emanates from the Constitution itself. The jurisdiction created is special and sui generis. Disputes as to membership of the House of Representatives must be determined thereunder. It is not open to the Attorney-General to sidestep this legislative scheme. To do so would be to deprive the proceedings of the statutory safeguards deliberately provided for by the legislature. In endeavouring to circumvent the scheme the Attorney-General has embarked upon an abuse of the process of the court. It matters not that the election date has long passed and the information did not surface until after the time limits set out under section 100 of the RPA had passed. No authority has been cited to advance and support the proposition that a challenge to the validity of the membership of an elected member of the House of Representatives can be brought outside of the procedure prescribed by section 97 of the RPA." (Emphasis mine.)

35. The dicta of Jamadar JA in **Dumas** (supra) para 133 (which was confirmed by the Privy Council in Privy Council Appeal No. 0068/2015 [2017] UKPC 12 dated May 8, 2017) does not

assist the applicant. Justice Jamadar clearly stated that "barring any specific legislative prohibition, the court, in the exercise of its supervisory jurisdiction and as guardian of the Constitution, is entitled to entertain public interest litigation for constitutional review of alleged non-Bill of Rights unlawful constitutional action ... ." (Emphasis mine.) There is a specific legislative prohibition as outlined above, and confirmed by the many authorities referred to, that clearly indicates the manner in which challenges to the election of a candidate are to be dealt with. Thus, where there is a challenge to the nomination and or election of elected candidate, such challenge must be by way of election petition pursuant to the legislative provisions that so provide.

36. With these authorities in mind, in order to decide whether this Court has jurisdiction to entertain this application, I will go through the various prayers for relief sought by Reid. But before doing so, I would like to state my position on a few of the submissions made on behalf of Reid, the AG and Mr. Harmon. I do not consider the submission to be of any merit that the word 'may' as used in **art 163(2)** and **(4)** and the relevant sections of **Chapter 1:04** gives a choice as regards the method of approaching the court to challenge an election or the election of an MP. The use of the word 'may' in these instances merely indicates that a litigant has a choice regarding whether or not to pursue such a challenge. It does not speak to a choice in the manner of instituting such a challenge. **Article 163** has given Parliament the responsibility of deciding how such a challenge is to be brought and this was done by **ss 3 (2), 5(1)** and **Rule 3** of **Chapter 1:04** by which such a challenge shall be by election petition.

37. The submission that **s 43** shows that not all petitions have to be brought within the twenty-eight day timeline does not assist Reid or the AG and Mr. Harmon. Indeed **s 43** of **Chapter 1:04** highlights that the twenty-eight day limitation does not apply to the commencement of all challenges to the election of an MP. But it provides that in these circumstances the application shall be by way of petition. The CPR clearly states at **Part 2.02(2)** that "These Rules do not apply to proceedings instituted under another enactment in so far as rules made under that enactment regulate those proceedings." Therefore, where an enactment provides for the commencement of proceedings by a particular method, that method must be utilized. Even if the limitation as regards the commencement of proceedings does not apply, based on the application of the **Local Authorities (Elections) Act, Chapter 28:03**, the fact is that this Act and **Chapter 1:04** clearly provide that such must be commenced by petition.

Analysis of the declarations sought vis-à-vis the Court's jurisdiction

38. Paragraph (1) of the prayers for relief seeks a declaration that the second respondent is not qualified for election as a member of the National Assembly by virtue of his dual citizenship. In my view and I so hold, this does not seek to nullify his election. Indeed, it speaks to his current status and whether he can in the future be qualified for election as an MP. I hold that this is not captured by the restrictions regarding the institution of proceedings regarding an election and therefore I have jurisdiction to address this issue.

39. As regards para (2), I am of the view that since this speaks to the second respondent's nomination on April 7, 2015 simpliciter, without reference to whether he was elected or not, that I have jurisdiction to adjudicate on this prayer.

40. Paragraph (3) refers to the second respondent's nomination as a candidate of the APNU+AFC list of candidates on April 7, 2015, and seeks to invalidate his nomination. On the facts of this case, since the second respondent was extracted from the list to take up a seat in the National Assembly, he would thereby have become an elected MP. Thus, although speaking to his nomination, the declaration sought is linked to the second respondent's election as it seeks to have the nomination deemed null and void. This prayer, therefore, has as its objective the reversal of the result of his election. As a result, I have concluded that to seek to nullify his nomination would amount to and does amount to a collateral attack on his election as an MP. To challenge his election would have necessitated compliance with the specialized procedures as outlined above, that is, by petition within twenty-eight days of the official declaration of results. Thus, I have concluded that I would have no jurisdiction to adjudicate as regards this prayer.

41. The declaration sought at para (4) to my mind need not be granted as it speaks to one of the facts upon which the application is based – that is, the citizenship of the second respondent which I have concluded is not in controversy. I will return to this issue in more detail.

42. The prayer at para (5) for a declaration that the second respondent was not qualified for election as an MP at the elections held on May 11th 2015 and was not qualified to vote on December 21st, 2018, is an attack on his election or eligibility to have been so elected. In order to seek such a determination Reid would have had to file an elections petition pursuant to the provisions outlined above. Therefore, I conclude that this Court has no jurisdiction to grant this declaration.

43. The claim for relief in para (6), in my view, has to be read in conjunction with para (5) as at the time he voted on December 21st 2018, the second respondent would have been an MP for over three years. The Court would have no jurisdiction to grant this declaration as it requests the Court to adjudicate on an issue that can only have been challenged by way of elections petition.

44. The declaration sought at para (7) of the application, I have concluded, speaks not to the second respondent's election, but to whether he could have voted against the list for which he was a representative in the National Assembly. However, this declaration seeks adjudication in relation to whether there has been a breach of **art 156(3)**. This provision is captured in **art 163(1)(b)(iv)**. **Chapter 1:04** provides that any suit regarding **art 156(3)** shall be commenced by way of petition. This is not the case here. So I would have no jurisdiction to grant this declaration.

45. As regards para (8) which seeks an order setting aside the order of the Speaker that the NCM, Resolution 101 was passed on December 21st, 2018, and para (9) which seeks both a stay of the enforcement of the NCM Resolution 101 and a conservatory order preserving the *status quo ante* that the Government remain in office, these are consequential orders that will be addressed depending on my conclusions in relation to the other declarations sought.

46. Thus, I have concluded that I have jurisdiction to determine the declarations sought at paras (1) and (2) of the FDA as they do not speak to the election of the second respondent or whether art 156(3) has been or is to be complied with. They are focused on whether in these circumstances he could be an MP in the future, on whether he could have been properly nominated on April 21st 2015 to contest the May 11, 2015 elections due to his dual citizenship. In this context, they really call for an interpretation of the Constitution and the High Court specifically has the responsibility to do so.

47. As regards paras (3), (5), (6) and (7) it does not matter that the second respondent is no longer an MP. The declarations sought at (3), (5) and (6) as outlined above would amount to an attack on his election, albeit belated. To conclude that I have jurisdiction to grant these declarations would be to enquire into the election of the second respondent. As regards para (7) equally they would require an inquiry into **art 156(3)** regarding notification that one was no longer voting with one's list which as I just emphasized, the authorities clearly show I cannot do in the absence of a petition.

48. In this regard I agree with the learning of Dr. Francis Alexis at paras 14.191 and 14.192 of his seminal work, **'Changing Caribbean Constitutions'**, (2nd edn, 2015) as cited on behalf of Reid at para 4 of his submissions in reply and include the last sentence of para 14.192 which may have been inadvertently omitted from these submissions, which states:

> "14.191 What have tended to be issues of interpretation of the Constitution are questions whether a person returned as a Representative was qualified, or not disqualified, to be elected. Often that battle is fought out on the field of citizenship. Whether such a matter should be brought as a constitutional application in the 'Constitutional Court' or as an election petition in the 'Election Court', can be controversial, especially when raised after an election for the purpose of unseating a person returned as a representative.
> 14.192 Perhaps the preferable view is that once an issue as to the interpretation of a Constitution truly indeed arises in a proper case, the Court should not decline jurisdiction. Judicial inclination is, though, that even if questions involve interpretation of the Constitution, they should be brought by the special provisions applicable to the determining of disputed elections, that is, by election petition." (Emphasis mine.)

49. However, I am cognizant that, while the issues relevant to the declarations sought pursuant to paras (3), (5), (6) and (7) cannot be enquired into because the correct procedure to engage the court has not been followed, and therefore it would be unnecessary to address them, it is evident that they raise issues of national importance that need to be addressed regarding the interpretation of art 165 (2) of the Constitution as regards the validity of the vote of an MP in a similar situation as outlined in the facts of this case, and its effect on the passage of the NCM. In **Sattie Basdeo in her capacity as Trustee of the Guyana Agricultural and General Workers Union & Anor v Guysuco & Others**, CCJ Appeal No GYCV2018/003, the Caribbean Court of Justice (CCJ) held at para 121, applying their decision in the Belizean case of **Ya'axche Conservation Trust v Wilbur Sabido, Chief Forrest Officer & Ors** CCJ Applcn BZCV 2014/003 that "an academic appeal may be heard if it raises an issue of public interest involving a distinct or discrete point of statutory interpretation which has arisen in the past and may arise again in the future." (See also **Bobb & Anor v Manning** [2006] UKPC 22; [2006] 4 LRC 735 at para 18.) It is therefore permissible to address matters of national interest moreso in order to bring clarity thereto and I have decided to do so in this case, especially as there have been

extensive submissions on all the pertinent issues. In this regard, any reference in this judgment to what would be the result if someone were disqualified from the National Assembly can only be made by way of comment and would not be referable to the second respondent's election to the National Assembly such as to deem it null and void.

50. In addition, it has been pleaded that the Speaker of the National Assembly in declining to review the certification of the NCM Resolution 101 indicated that it would be best if a Court of competent jurisdiction gave guidance for the future. This is what the Speaker said on January 3rd 2019 as quoted in Reid's affidavit in support of his application for a stay of the NCM Resolution 101 and conservatory order preserving the status quo of the Government:

> "The issues which many have expressed concern about require final determination which will place the interpretation and import of the particular provisions of the Constitution beyond doubt. …
> Where, as in these instances before us, there are different, even competing views of certain provisions of the Constitution, as well as certain inter-related provisions of the Constitution all of which fall to be examined, the Speaker on this occasion and without more, declines the invitation to act in reversal. …
> Full, final and complete settlement of these issues by a Court of competent jurisdiction will place beyond doubt any question which may exist and serve to give guidance to the Speaker and to the National Assembly for the future."

Qualification to be a Member of Parliament – Dual Citizenship

51. The Constitution of Guyana is very clear on the issue of dual citizenship.

Article 53, as is relevant to this case, states:

> 53. Subject to article 155 (which relates to allegiance, insanity, and other matters) a person shall be qualified for election as a member of the National Assembly if, and shall not be so qualified unless, he or she –
>
> (a) is a citizen of Guyana of the age of eighteen years or upwards;
>
> (b) … ."

Article 155 provides as follows:

> "155 (1) No person shall be qualified for election as a member of the National Assembly who -
>
> (a) is, **by virtue of his own act**, under any acknowledgment of allegiance, obedience or adherence to a foreign power or state." (Emphasis mine.)

The combination of these articles means that to be qualified to be elected to the National Assembly one must be at least eighteen years old and a Guyanese citizen. In my view it does not restrict citizenship to being a Guyanese by birth.

52. Given the evidence produced by and on behalf of Reid, it is clear that the second respondent is a Guyanese citizen and that he has declared himself to be a Canadian citizen. The evidence is that he was issued with a Guyana passport in 1987 which passport he has renewed; at least he did so in 2012. As regards the issuance of the Guyana passport it was recorded that the second respondent was born at Betsy Ground, Canje, Berbice in 1952. This establishes that he is a Guyanese citizen by birth. There is also sufficient undenied evidence that the second respondent has a Canadian passport which he acquired in 1998 and that he has renewed and travelled using a Canadian passport with information that his current passport was issued in October 2017. The immigration records disclose that he has presented himself to immigration authorities here in Guyana as a Canadian citizen utilizing a Canadian passport with the last record of such being in August 2018. A record of travel exhibited discloses that he travelled on the said passport on August 24, 2018. Copies of immigration forms produced show that the second respondent noted on those forms that he is a Guyanese-Canadian.

53. The question of one's acknowledgement to a foreign state has to be determined according to the law of that state. This is borne out by the cases of **Abraham Dabdoub v. Daryl Vaz, Carlton Harris & The AG of Jamaica and Daryl Vaz v Abraham Dabdoub (Dabdoub v Vaz)** Civ Apps Nos. 45 & 47/2008 CA, J'ca and the Australian case of **Sykes v Cleary & Ors** [1992] 176 CLR 77 among others to which I will refer shortly. The evidence is that in order to become a Canadian citizen, one has to swear allegiance to that country by taking an oath. It was deposed, in support of Reid, by one Selwyn Pieters, a Canadian citizen, who is a barrister and solicitor since 2005 that to become a citizen one not only has to obtain a certificate of citizenship, but importantly one has to take an oath as follows:

> "I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen."

54. The authority of **McAteer, Topey & Bar-Natan v The AG of Canada** 2014 ONCA 578 was cited and exhibited in support. In this case, the appellants challenged the requirement for them to swear or affirm allegiance to the Queen in order to become a Canadian citizen contending that this was a violation of their freedom of conscience and religion, freedom of expression, and equality as provided for in the Charter of Rights and Freedoms. In holding that the appellants' Charter rights were not breached, the Ontario Court of Appeal had this to say:

> "1. Permanent residents of Canada over 14 years old who wish to become Canadian citizens are required to swear to an oath or make an affirmation: See Citizenship Act, RSC 1985, c. C-29 (the "Act") s. 3(1)(c). Subject to limited discretionary exceptions, s. 12(3) of the Act provides that a certificate of citizenship issued by the Minister of Citizenship and Immigration does not become effective until the oath is taken. Section 24 of the Act requires a person to take the oath in the form set out in the Schedule to the Act … . [as just outlined above [43].]
>
> 48. The evolution of Canada from a British colony to an independent nation and democratic constitutional monarchy must inform the interpretation of the reference to the Queen in the citizenship oath. As Canada evolved, the symbolic meaning of the Queen in the oath has evolved. The Federal Court of Appeal in *Roach* read the reference to the Queen as a reference not to the person but to the institution of state that she represents.
>
> …
>
> 52 … The oath to the Queen of Canada is an oath to our form of government, as symbolized by the Queen as the apex of our Canadian parliamentary system of constitutional monarchy.
>
> 53. … 'Swearing an oath as a prerequisite to citizenship is a common practice followed in many countries. It is, in essence, a simple inquiry as to whether an individual is committed to the country and shares the basic principles or ideals upon which the country was founded.'
>
> 73. The purpose of the oath is to inquire into prospective citizens' willingness to accept the rights and responsibilities of citizenship. In exchange for the privilege of Canadian citizenship, the would-be citizen solemnly promises to be loyal to the values represented by Canada's form of government and to accept the responsibilities of citizenship."

55. As noted earlier [12], the evidence that he is a citizen of both Guyana and Canada, that is, that he holds dual citizenship was not challenged by the second respondent. He did not file an affidavit in defence to claim otherwise and para 9 of the strike-out application filed on his behalf

states that the facts disclosed in Reid's application are not disputed. I have concluded that as regards his citizenship of Canada, and given the evidence of the required formalities, he would have had to voluntarily or "by virtue of his own act" swear allegiance to that country when he would have had to take the oath. I hold that there is sufficient evidence disclosed on Reid's affidavit and the supporting affidavits which permits a finding that the second respondent holds both Guyanese and Canadian citizenship and he therefore holds dual citizenship. There is no evidence that the second respondent has renounced either his Guyanese or his Canadian citizenship. Applying authorities which I will shortly outline, by his own acts the second respondent has demonstrated that he is under an acknowledgment of allegiance, obedience or adherence to a foreign power or state.

56. The issue of the legal implications of a holding a passport was dealt with in **Joyce v DPP** [1946] AC 347. The appellant who was an American citizen had been living in England for a number of years and had applied for and obtained a British passport which he renewed and used for travel. During the war between Great Britain and Germany he was proved to have been employed by a German radio station and to have delivered messages to the enemy, all the while still being the holder of a valid British passport. He was convicted of high treason and on appeal one of the grounds was a challenge to the court's jurisdiction to try an alien for an offence against British law committed in a foreign country. He also challenged the direction to the jury as regards his allegiance to His Majesty the King during the period in issue. His appeal was dismissed. Lord Jowitt, LC in his judgment had this to say (pp 369 – 370):

> "The terms of a passport are familiar. It is thus described by Lord Alverstone CJ in **R v Brailsford** [1905] 2 KB 730, 745:
>
> > 'It is a document issued in the name of the sovereign on the responsibility of a minister of the Crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries …'
> >
> > …
>
> But the possession of a passport by one which is not a British subject gives him rights and imposes upon the sovereign obligations which would otherwise not be given or imposed … By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects. By his own act he has maintained a bond which while he was within the realm bound him to his sovereign."

So it is clear that the holding of a passport has far-reaching consequences. A person who holds a passport is under acknowledgement of allegiance and by renewing the passport, he is by his own act renewing that allegiance to the State which issued the passport to him.

57. Then there is the case from Trinidad and Tobago – **Chaitan and Peters v The AG of Trinidad & Tobago & Ors** (2001) 63WIR 244. Here, two candidates for election were both born in Trinidad and were therefore citizens of Trinidad and Tobago. Mr. Chaitan voluntarily became a citizen of Canada in February 1978, while Mr. Khan voluntarily became a citizen of the USA in July, 1996. Subsequently they both applied for and obtained certificates of renunciation as citizens of their adopted countries. However, the renunciations were not in effect as at the date of nomination, though they were by the date of the election. They both won their respective elections and the losers challenged their nomination and election by way of an application for leave to file election petitions. They in turn filed suit with the basis for their claims being that their fundamental rights to due process of law and protection of the law as guaranteed by ss 4 and 5 of the Constitution of Trinidad and Tobago were being contravened by the proceedings that were brought to unseat them as elected members of the House of Representatives. The case turned primarily on whether the constitutional challenges could have been made to the applications for leave to issue an election petition. The constitutional motions were dismissed at first instance and upheld on appeal. The decision of the Court of Appeal was that the resort to the Constitution could not be utilized to object to election petitions and that in any event it had not been shown that any constitutional rights had been breached. More importantly as it relates the case at bar, as regards the dual citizenship issue, it was held that a citizen of Trinidad and Tobago is disqualified for election to the House of Representatives if he has voluntarily become a citizen of or is under a declaration of allegiance to a foreign power or state country. In order to negate this result, such a candidate would have had to renounce the citizenship of the foreign power or state. It was held that an effective renunciation must be prior to nominations day since this is the day on which candidates are identified permitting electors to know who are the persons who have been successfully nominated.

58. I feel I should mention the case of **Liburd v Hamilton et al** SKBHCV No. 20 of 2010 from St. Christopher-Nevis as it demonstrates a distinction between those who are holders of passports of a foreign country and those who are merely entitled to residency. This case would be instructive for the many Guyanese who may have alien resident status in but are not citizens

of countries. In this case, there was a challenge to the election of a member of the House of Representatives on the ground that he had acknowledged allegiance to a foreign state, that is, the United States of America. However, the evidence which was accepted by the Court was that the Member was not a citizen of the US but that he was the holder of a US alien resident card. The Member still retained his Kittian citizenship and travelled on a Kittian passport only. Justice Hariprashad-Charles in giving the judgment in this case held that the holder of such a card which accorded 'lawful permanent resident status' cannot be considered to be under acknowledgement of allegiance, obedience of adherence to a foreign state. Thus, he was duly qualified and not disqualified from being nominated as a candidate for and being elected as a Member of the National Assembly.

What is the effect of holding dual citizenship?

59. What then is the effect of holding dual citizenship? This issue has drawn and continues to draw attention throughout the Commonwealth, more particularly in Australia and closer to home Jamaica, St. Christopher-Nevis and Trinidad and Tobago. **Article 156 (1) (d)** of our Constitution provides as follows:

> "156 (1) A member of the National Assembly shall vacate his seat therein —
>
> ...
>
> (d) subject to the next following paragraph, if any circumstances arise that, if he were not a member of the Assembly, would cause him to be disqualified for election as a member thereof by virtue of the preceding article or of any law enacted in pursuance thereof." (Emphasis mine.)

(The next following paragraph referred to in this sub-article provides for when a Minister acts as President pursuant to **art 178(4)**.)

This is to say, if as in this case, a member is found to be disqualified due to dual citizenship, he or she would be required to vacate his or her seat, though as noted pursuant to art 164(1)(b)(iv) and (4) and Chapter 1:04 any challenge regarding such would have to be commenced by petition.

60. In **Dabdoub v Vaz** (*supra*), the Court of Appeal of Jamaica had to deal with this issue. I will give the details of this case, which I have taken from the judgments of the Court, because I think it would be instructive for us in Guyana. Mr. Dabdoub and Mr. Vaz contested the elections for the West Moreland constituency in the Jamaican general elections held on September 3rd

2007. At the conclusion of the counting of ballots, Mr. Vaz was declared the winner and was sworn in as a member of the House of Representatives. Mr. Dabdoub filed an election petition on October 1st 2007 challenging the right of Mr. Vaz to sit in the House of Representatives having been elected as a Member of the House of Representatives. In urging his disqualification, Mr. Dabdoub advanced that he should then have been returned as the elected representative for the constituency. Chief Justice McCalla, at first instance, found that Mr. Vaz was not entitled to be returned as the duly elected Member as by his positive acts of renewing and travelling on a US passport he had by virtue of his own act acknowledged his allegiance, obedience or adherence to the US. It was also held that Mr. Dabdoub was not thereby automatically qualified to be elected to the House and that there had to be a by-election.

61. It was alleged by Mr. Dabdoub that Mr. Vaz was a citizen of the United States of America (US), and the holder of a US passport issued by the Government of the USA which was issued by the embassy in Kingston, Jamaica. This was communicated to Mr. Carlton Harris who was the returning officer at the time of the nomination exercise. Accordingly, it was claimed that the nomination of Mr. Vaz was null and void so that Mr. Dabdoub was the only validly nominated candidate and was therefore entitled to be returned as the duly elected Member of Parliament for the constituency. The basis for this claim was Mr. Dabdoub's reliance on s 40(2)(a) of the Constitution of Jamaica which is similar to our art. 155 outlined above. Section 40(2)(a) provides that "No person shall be qualified to be appointed as a Senator or elected as a Member of the House of Representatives who (a) is, by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a foreign power or state." The USA was a foreign power or state.

62. Mr. Vaz, who was born in Jamaica, admitted that he was a US citizen and the holder of a US passport which he had acquired since 1968 when he was added to his mother's passport as he had gained US citizenship through his mother who was born in Puerto Rico and as such was a US citizen as of right. He was also a Jamaican citizen and the holder of a Jamaican passport. Therefore, the Court noted that Mr. Vaz had acquired citizenship by virtue of derivation at birth pursuant to US law. His mother had also secured his own US passport in 1978. As an adult he had renewed his US passport and at the time of the case, had had a valid US passport which had been issued in 2004. He had also travelled using the US passport and had presented himself to immigration authorities as an American citizen.

63. Mr. Vaz denied that he had contravened s 40(2)(a) of the Constitution of Jamaica in that he had not by virtue of his own act been under any acknowledgment of allegiance, obedience or adherence to a foreign power or state. His position was that by operation of US law he had been under allegiance to that power from birth and not by virtue of any affirmative act by him or his mother. Alternatively, he contended that since he was a US citizen from birth, the acquisition and renewal of his US passports did not matter such as to cause any disability that he did not have prior to the acquisition or renewal of the passports. It was also contended that he did not take an oath nor was there any acknowledgement of allegiance, obedience or adherence to the US either in the passport application form and/or renewal form and/or in the passport itself. In his grounds of appeal Mr. Vaz also noted that the word 'citizen' was not used in s 40(2)(a) while it was used in s 41(d) (regarding when the seat of a member becomes vacant) thus demonstrating that the Jamaican Constitution permitted dual citizenship.

64. Justice Panton P at para 22 of his judgment considered that "the evidence in relation to the renewal and usage of the United States passport by Mr. Vaz is critical to the outcome of the appeals. It is so as there is really no dispute as to the citizenship aspect." His Lordship concluded that there was evidence to support Chief Justice McCalla's decision that Mr. Vaz by virtue of his own act, was under acknowledgment of allegiance, obedience or adherence to the USA. Thus, it was not his US citizenship per se that disqualified him as he did not come to be a such a citizen by his own act, but it was his voluntary act of allegiance, obedience or adherence that barred him. (See para 34 of the judgment of Panton P.) So it did not matter that he was born in Jamaica.

65. Justice Smith JA at paras 68 to 69 also expounded as follows:

> "68. The critical question, then, is: has Mr. Vaz himself taken any steps to acknowledge allegiance to a foreign power or state? … The issue on appeal is whether he, by renewing and travelling on his foreign passport, had taken positive steps to acknowledge allegiance to the United States of America. Allegiance is defined as "the obligation of fidelity and obedience to a government owed by an individual in consideration for the protection that government gives. See Words and Phrases Legally Defined 4th Ed. p. 115. It is a legal bond in which there are two (2) parties – the subject and sovereign. It is referred to as a mutual bond and obligation between the sovereign and his subject (a government and its citizens) because the subject has a duty to serve and be loyal and the sovereign a duty to protect op. cit.

69. The word 'acknowledge' means to "accept or admit the existence or truth of; to confirm receipt of or gratitude for"- Concise Oxford English Dictionary, Thumb Index Edition 10th Edn, Revised.

70. I accept as correct, the submission … that the status of being under acknowledgment of allegiance may be obtained by the act of the concerned person or by the act of the foreign state or power itself.

…

72. In my opinion, there is merit in the submission of Mr. Dabdoub that the issuing of a United States Passport to Mr. Vaz is an acknowledgement by the United States that Mr. Vaz owes allegiance to the United States.

73. The authorities show that by renewing and travelling on a passport, an individual is by virtue of his own act acknowledging allegiance to the State which issues the Passport."

66. In **Sue v Hill** (1999) 199 CLR 462 apart from a challenge to the jurisdiction of the court which the Court confirmed it had due to the specific legislation pursuant to the Constitution, the issue was whether Mrs. Hill was qualified to be a senator. Mrs. Hill was born in the United Kingdom and in 1971 migrated to Australia with her family when she was a child. She married an Australian and had two children who were both in Australia. On a number of occasions when she travelled abroad she used a British passport. In 1998 she applied for an Australian passport but before it was issued she travelled to New Zealand on her British passport. While there she was issued with the Australian passport which she used for her return journey. At the time Mrs. Hill was granted Australian citizenship there was no need to renounce one's foreign citizenship and the recipient of Australian citizenship only had to swear allegiance to Australia. A month after the election, Mrs. Hill became aware that she had to take steps to renounce her British citizenship. She therefore took steps to do so by completing the required declaration of renunciation, paying the fee and surrendering her British passport.

67. It was held that Mrs. Hill was a subject or citizen of a foreign power, that is, the United Kingdom and therefore she was not duly elected.

68. Another Australian case of **Sykes v Cleary** (*supra*) at para 52 was cited in **Dabdoub v Vaz** where it was stated that the reason for what may be called the dual provision is to ensure that "Members of Parliament did not have a split allegiance and were not as far as possible, subject to any improper influence from foreign governments." In this case, the petitioner brought proceedings in the Court of Disputed Returns to challenge the election of *inter alia* two persons,

Mr. Delacretaz and Mr. Kardamitsis, on the ground that though they were naturalized Australian citizens, they were subjects or citizens or entitled to the rights and privileges of a subject or citizen of a foreign power and were therefore under acknowledgement of allegiance to a foreign power within the meaning of s 44(i) of the Constitution of Australia which states:

> "Any person who:
>
> (i) is under any acknowledgement of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to rights or privileges of a subject or a citizen of a foreign power; ...
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives."

And s 45 (i) provides that if a senator or a member of the House of Representatives "becomes subject to any of the disabilities mentioned in the last preceding section [his or her] place shall thereupon become vacant."

69. Mr. Delacretaz, who was born in Switzerland in 1923 and emigrated to and lived in Australia from 1951, remained a Swiss citizen by birth. He became a naturalized citizen in 1960 and in so doing renounced all allegiance to a foreign State and swore allegiance to Australia. However, he did not make any application to the Swiss government to renounce or terminate his Swiss citizenship which was permitted by Swiss law. He was the holder of an Australian passport only but was still by virtue of his Swiss citizenship entitled to obtain a Swiss passport.

70. Mr. Kardamitsis was born in Greece in 1952 and was therefore a Greek citizen by birth. He emigrated to Australia in 1969 and lived in Australia since. He too became an Australian citizen in 1975 and similarly renounced all allegiance to a foreign State and swore allegiance to Australia. He also did not make an application to renounce his Greek citizenship. At the time of becoming an Australian citizen he was the holder of a Greek passport which later expired and subsequently became the holder of an Australian passport in 1978 which he used for travel including to Greece. He had surrendered his Greek passport to the Australian government on becoming a citizen. He had participated in public life in Australia including becoming a local government councilor whereby he had to make a declaration of allegiance to Her Majesty the Queen and the laws of Australia.

71. It was held by Mason CJ, Toohey and Mc Hugh JJ at para 29 that "nomination is an essential element in the process of choice that is the electoral process". It was further held at para 53 that as regards renunciation of one's birth nationality,

"what amounts to the taking of reasonable steps to renounce foreign nationality must depend upon the circumstances of the particular case. What is reasonable will turn on the situation of the individual, the requirements of the foreign law and the extent of the connection between the individual and the foreign State of which he or she is alleged to be a subject or citizen. And it is relevant to bear in mind that a person who has participated in an Australian naturalization ceremony in which he or she has expressly renounced his or her foreign allegiance may well believe that, by becoming an Australian citizen, he or she has effectively renounced any foreign nationality."

Justice Brennan further held that (para 7 of his judgment):

" ... it is not sufficient ... for a person holding dual citizenship to make a unilateral declaration renouncing foreign citizenship when some further step can reasonably be taken which will be effective under the relevant foreign law to release that person from the duty of allegiance or obedience. So long as that duty remains under the foreign law, its enforcement – perhaps extending to foreign military service – is a threatened impediment to the giving of unqualified allegiance to Australia."

72. On the facts outlined, it was held by a majority of the High Court of Australia that Mr. Delacretaz had failed to make the requisite demand to renounce his Swiss citizen and as such had not taken reasonable steps to divest himself of Swiss citizenship. Similarly, as regards Mr. Kardamitsis, he omitted to seek the discharge of his Greek nationality and as such had not taken "reasonable steps to divest himself of Greek citizenship and the rights and privileges of such a citizen." Although they had both "renounced their allegiance to their countries of birth when they became Australian citizens, this did not result on their foreign nationality being relinquished under the law of those countries." (See Dawson J at para 5.) In the circumstances, neither was eligible to be nominated and therefore elected to the House of Representatives. Therefore, their election was void.

73. **Sykes v Cleary** was confirmed in **Re Canavan, Re Ludlam, Re Waters, Re Roberts [No.2], Re Joyce, Re Nash, Re Xenophon** [2017] HCA 45 (**Re Canavan**). I refer to three of the nominations for the Senate which engaged the attention of the Court: those for Mr. Ludlam, for Ms. Waters and Ms. Nash. Mr. Ludlam resigned his seat on learning that he had dual citizenship. He did not dispute that he was a citizen of New Zealand, although this was unknown to him. He was born in New Zealand and had emigrated with his family to Australia as a child. He and his

family became naturalized Australians. He believed that he upon his naturalization he was exclusively an Australian citizen and that he held no other citizenship. However, according to New Zealand law he remained a citizen of that country by birth, though he could have lost such citizenship by renouncing it or by ministerial order. Since he had not done so, at the date of his nomination to the senate he had not lost his New Zealand citizenship and so it was confirmed that he would not have been eligible to be nominated for election to the Senate. His seat was therefore confirmed as being vacant.

74. Ms. Waters was born in Canada to Australian parents. She resigned from the Senate because of her concern that her citizenship status may have been affected because she had been born in Canada. She applied to renounce her Canadian citizenship which was confirmed by the High Commission of Canada. However, this came after she would have been elected to the Senate. As a result it was held that she was incapable of being chosen or sitting as a senator and that her seat was therefore confirmed as being vacant.

75. Finally, there is the case of Senator Nash who was born in Australia to a Scottish father and Australian mother. Her older sisters were born in England. The family returned to Australia where her parents subsequently divorced. She grew up and went to school in Australia and had been a senator since 2005. Before 2017, Senator Nash did not know that she was a British citizen. It had been her belief that she had to apply to have such citizenship conferred on her. She had never visited the United Kingdom, nor had she received any privileges from the UK. In August 2017, she completed a declaration renouncing of her British citizenship which was confirmed by the British Home Office. It was held that at the date of her nomination as a senator, having not as yet renounced, she being still then a British citizen, was incapable of being chosen to sit as a senator by virtue of s 44(i) of the Constitution of Australia. Hence her seat was deemed vacant.

76. Then there is the 2018 case of **Re Gallaguer** [2018] HCA 17 also a case from Australia. In this case, Senator Gallaguer lodged her nomination as a candidate for the Senate in May 2016, she having previously served as a senator from March 2015. She was elected as a senator in August 2016. However, it was not disputed that Senator Gallaguer was a British citizen at the time of her nomination, she having so acquired such citizenship by descent through her father. She was therefore a citizen of a foreign power within the meaning of s 44(i) as outlined above. She retained her status as a British citizen until August 2016 when her declaration of

renunciation of that citizenship by the Home Office of the United Kingdom was registered. Based on these facts, the Senate resolved that the issue regarding the vacancy of her seat be considered by the Court of Disputed Returns.

77. Senator Gallaguer contended that she had done all in her power to have her renunciation registered and that she was not responsible for the delay in this regard. She submitted that the reason why she did not cease to be a British citizen at the time of her nomination was because of matters beyond her control as she had been awaiting the action of the relevant British authority. It was held that "section 44(i) would have effect regardless of the extent of the person's knowledge of that status or his or her intention to act upon the duty of allegiance with that status." (para 7 per Kiefel CJ, Bell, Keane, Nettle and Gordon JJ.) It was also held that "[i]t is not sufficient for the exception to s 44(i) to apply for a person to have made reasonable efforts to renounce." (para 37, supra.)

78. Justice Gageler further stated in concluding that it was for Senator Gallagher to have ensured that her renunciation had been obtained prior to her nomination (para 45):

> "An Australian citizen who has done everything reasonably within his or her power to renounce his or her citizenship of another country under the law of that country remains within the ambit of the disqualification expressed in s 44(i) for so long as a process of renunciation provided for by the law of that country simply remains incomplete. Retention of foreign citizenship can hardly be said to be irremediable while it remains in the process of being remedied. The implied exception cannot be engaged unless and until such time as such process of renunciation as is provided for by the law of the other country can be characterised for practical purposes as a process that will not permit the person to renounce the foreign citizenship by taking reasonable steps, requiring if not that an impasse has actually occurred then at least that an impasse can be confidently predicted."

79. It was noted in the joint judgments of Mason CJ, Toohey and McHugh JJ in **Sykes v Cleary** that the provision regarding dual citizenship "finds its place in a Constitution which was enacted at a time, like the present, when a high proportion of Australians, though born overseas, had adopted this country as their home." [para 52.] Similar sentiments by analogy can be expressed for Guyana. Article 155 (1) (a) has remained a part of our Constitution in circumstances where it is well known that Guyana has a large diaspora population, some of whom may wish to serve as MPs but are either born overseas of Guyanese parentage or are born

Guyanese who have other citizenships, however acquired. It was further noted in **Re Canavan** at para 53 that their dual citizenship provision "draws no distinction between foreign citizenship by place of birth, by descent or by naturalization."

80. The combined effect of arts 53 and 155 is simple. These provisions seek to preserve for membership of the National Assembly persons who hold only Guyanese citizenship and who would not have voluntarily taken an oath of allegiance to another country, or would not have taken action, for example, by acquiring and travelling on a foreign passport which is evidence of citizenship of another country, that would cause him or her to be under any acknowledgment of allegiance, obedience or adherence to a foreign power or state. I adopt the definitions of these terms as outlined in the judgment of Smith JA in **Dabdoub v Vaz** (supra). Thus, if one is under any acknowledgment of allegiance, obedience or adherence to a foreign power or state, then even if one is a Guyanese by birth, one would thereby hold dual citizenship and one would be disqualified from membership of the National Assembly.

81. While some may say that this does not permit the fullest participation of diaspora Guyanese in the political leadership of Guyana – this is not for this Court to pronounce on. The Constitution is clear. If it was honoured in the breach as stated by Mr. Nandlall – this can be of no moment as until it is amended to provide otherwise, the constitutional provision must be adhered to. Any change to reflect a different view may be undertaken by way of constitutional amendment if the public and their Parliamentary representatives are so inclined.

82. I therefore hold that anyone who holds dual citizenship, that is citizenship of Guyana and of a foreign power or state, as envisaged by **art 155(1)(a)** and therefore falls into this category of disqualified person pursuant to **art 156(1)(d)**, should not and cannot be a Member of Parliament. As such the declarations sought in terms of paras one and two of the prayers for relief are granted. Therefore, I hold and declare that the second respondent is not qualified for election as a member of the National Assembly by virtue of his own act and acknowledgement of allegiance, obedience and adherence to a foreign power to wit, the Sovereign State of Canada, in contravention of **art 155 (1) (a)** of the Constitution of Guyana. Further, it is also declared that the second respondent was on the 7th April, 2015 disqualified from being nominated as a member of the National Assembly of the Cooperative Republic of Guyana.

Voting against the List one has been elected to represent

83. As regards the second issue in controversy – Reid contends that an MP cannot vote against the party from whose list he or she has been extracted to take up a seat as MP. I address these issues as comments by way of guidance for the future since I have found that to have the second respondent's seat vacated would require the filing of a petition. **Article 153(3)** of the Constitution provides:

> "153 (3) A member of the National Assembly elected on a List shall cease to be a member of the Assembly, if –
>
> (a) he or she declares in writing to the Speaker or to the Representative of the List from which his or her name was extracted that he or she will not support the List from which his or her name was extracted;
>
> (b) he or she declares in writing to the Speaker or to the Representative of the List from which his or her name was extracted, his or her support for another List;
> (c) the Representative of the List from which his or her name was extracted indicates in writing to the Speaker that after meaningful consultation with the Party or Parties that make up the List that the Party or Parties have lost confidence in that member and the Representative of the List issues a written notice of recall to that member and forwards a copy of that notice to the Speaker."

84. It was submitted by Mr. Boston that this Court should interpret the Constitution to say that having voted against his list, the second respondent notionally and simultaneously ceased to be an MP since he did not comply with art 153(3). This is to say, it was submitted, as soon as he voted 'yes' to the NCM he immediately ceased to be an MP and this invalidated his vote so that there was no vote for the Speaker to accept. His vote therefore could not have been counted. Thus, without the second respondent's vote, the vote on the NCM would have been tied and would not have been carried.

85. However, if pursuant to art 156(3) there is no notification to the Speaker of the National Assembly or the Representative of the List, one cannot say that immediately before a vote against their Party List that that MP can be said to have ceased to be an MP. To put it in not so elegant terms – one who is an MP but switches in this context just as a vote is about to be taken, is still an MP immediately before the switch. It may be wrong, some may even say immoral, it

may be disloyal and a violation of the spirit & intent of the Constitution for such an MP not to have communicated their change of heart as provided for in art 156(3), but they would not have ceased to be an MP at the time of the vote.

86. Further, art 58 outlines a penalty for a person who remains an MP while unqualified. This article states that:

> "58. (1) Any person who sits or votes in the National Assembly, knowing or having reasonable ground for knowing that he or she is not entitled to do so, shall be liable to a penalty of fifty dollars for each day upon which he or she sits or votes.
> (2) Any such penalty shall be recoverable by civil action in the High Court at the suit of the Attorney-General."

87. This simply provides for a penalty of $50.00 per day recoverable in a civil action by AG. **Article 58** does not say that a vote by an unqualified person is a nullity. The provisions are clearly meant to deter and prevent what is termed as 'crossing the floor'.

88. Thus, to my mind, despite his 'Yes' vote in favour of the NCM, the second respondent's vote in this regard was not a nullity and therefore on this basis the NCM would not have failed. So apart from the issue of jurisdiction, the declaration sought at para 7 "that by reason of the unlawful 'Yes' vote cast by the second respondent, the No Confidence vote was not passed" would not have been granted.

Effect of disqualification – art 165(2)

89. There is another reason why I consider that the second respondent's vote, whether as a dual citizen or having crossed the floor, cannot be invalidated. This is based on an interpretation of art 165(2) which I consider to be pivotal to a determination of this issue. Article 165(2) states:

> "165 (2) The Assembly may act notwithstanding any vacancy in its membership (including any vacancy not filled when the Assembly first meets after the commencement of this Constitution or after any dissolution of Parliament) and the presence or participation of any person not entitled to be present at or to participate in the proceedings of the Assembly shall not invalidate those proceedings." (Emphasis mine.)

In discussing this provision, I must re-emphasise that any reference to the effect of dual citizenship vis-à-vis the nomination and election of the second respondent and his having voted against his list would not be a finding such as would affect his election to the National Assembly as I have found that I would have no jurisdiction to do so pursuant to an application such as this since it is not a petition.

90. As regards the contention by Mr. Datadin and Mr. Nandlall that this sub-article protects the validity of proceedings of the National Assembly despite unqualified persons having participated in such proceedings, it was advanced by Mr. Boston and Mr. Forde that this would lead to the absurd situation that an act of Parliament, irrespective of its constitutionality could not be invalidated. As noted earlier [22], there were two opposing contentions on behalf of Reid and the AG as against that for Mr. Harmon in this regard. Mr. Boston at first submitted that the NCM proceeding was valid, the proceeding being the presentation of the motion, the debate and the voting so the meeting of the National Assembly was valid, the debate was valid, but the conclusion derived from the proceeding was invalid. This is to say the vote and the tally of the votes which was the decision from the voting were invalid since the second respondent's vote ceased to be valid when he unlawfully voted yes, he being disqualified by virtue of his dual citizenship and having crossed the floor. Put it another way, the tally took into consideration an unlawful voter.

91. Then Mr. Boston said that the proceeding ceased to be valid because of the second respondent's unlawful vote. I acknowledged Mr. Boston's response that if the second respondent had voted against the NCM he would not have breached the crossing the floor provision in **art 156(3)** so his vote would have been valid on this ground. However, Mr. Boston declined to say whether, if he had voted against the NCM, whether his vote would have been invalid because of his dual citizenship. He stated that he would leave this aspect to be dealt with by Mr. Forde for the added party, Mr. Harmon.

92. Mr. Robertson, on behalf of the AG, supported Mr. Boston's submissions on the validity of the vote and the effect of the second respondent voting against the list he represented. He however sought to clarify the issue of the validity of the proceeding and the invalidity of the voting or at least the second respondent's vote. He said that the vote was unlawful because he was not entitled to vote. As such, while submitting that the proceeding was valid he said that the second respondent's vote could be severed as in the case of an invalid clause in a contract. In this

regard, he said that if the second respondent had voted against the NCM, his vote would have been similarly invalid because he was not entitled to vote due to his dual citizenship; in which case there would have been a tie and the motion would not have carried.

93. It was ultimately submitted on behalf of Reid and the AG that **art 165(2)** only permits the validation of the proceedings which were validly conducted, but not the validation of an unconstitutional and unlawful vote by a person in such valid proceedings, who was unqualified to so vote. In this instance, though it was accepted that the NCM proceedings were not unconstitutional and therefore validly conducted, it was contended that since the second respondent could be considered to be a usurper, who participated in the NCM proceedings, his vote could not be validly counted and had to be nullified. Thus, his vote could not be saved by virtue of **art. 165(2)**, which, for example, contemplated the saving of proceedings where voting may have taken place although all members were not present, or where an impostor may have participated.

94. There was much in terms of reliance on whether the second respondent was a usurper or a *de facto* participant. Mr. Nandlall contended that if it is accepted that the second respondent was disqualified from sitting in the National Assembly, he could be likened to a *de facto* participant pursuant to the *de facto* doctrine which is a branch of the doctrine of necessity. Further he said, **art 165(2)** is a codification of the *de facto* doctrine.

95. Mr. Boston supported by Mr. Robertson countered this argument citing **Fawdry & Co (a firm) v Murfitt (Lord Chancellor intervening)** [2002] 3 WLR 1354 (**Fawdry**) to say that the *de facto* doctrine cannot be applied to validate an act which was known to be invalid, that is, the second respondent's vote could not be validated if he knew he could not validly vote. They said that the doctrine does not apply to persons who hold elected office as it only operates to validate the acts of a judge or officer who was not validly appointed where such acts involve the public interest or third parties. It was also submitted that the *de facto* doctrine does not apply to a usurper into which category they say the second respondent fell. To quote Mr. Robertson, "a usurper is someone, who knows, even if the world knows not, that he is not qualified to hold the office he did". Mr. Robertson also stated that the *de facto* doctrine was a part of the doctrine of necessity which was codified in art 165(2) and is meant to protect third parties who may have acted as a result of an action of a person who was not authorised to act. As such the previous voting by the second respondent in other proceedings of the National Assembly would be valid

as third parties would have been affected. But the Speaker could not be considered to be a third party as nothing has happened as a result of his acceptance of the NCM vote, that is the government has not resigned and no election has been held.

96. Applying **Fawdry** at para 22, the *de facto* doctrine "depends upon [one] having been generally thought to be competent to act and treated as such by those coming before him." Mr. Nandlall produced authority from V G Ramachandran's Law of Writs (6th edn, 2006) at p 1378 that reveals that the *de facto* doctrine can be applied to ministerial and elective offices. The author had previously stated at p 1376 that the "*de facto* doctrine is invoked to attach validity to acts of officers irrespective of the legality of their appointment or election. The doctrine is founded on public policy and protection of society." Then at p 1377 it was further stated that the doctrine developed because "For the good order and peace of society, their authority, must be upheld until in some regular mode their title is directly investigated and determined." On the other hand, a usurper was defined at p 1376 as "an intruder or usurper who has no right or claim to the office and takes all actions without authority of law."

97. I do not consider that a person in the position of the second respondent was a usurper. More especially as it appears that he was only considered to be a usurper as regards the NCM and not as regards his other actions as an MP. Further, there is no evidence that the second respondent knew he was not qualified to be elected, moreso as there have been submissions that not only he had dual citizenship while sitting as elected MP. He would have been extracted from the List of the APNU+AFC by the representative of this List and made an MP for that List. He could not have been and was therefore not a usurper. In any event, I consider that I do not have to rely on this doctrine because **art 165 (2)** would suffice for a determination of this issue. As noted above, counsel on both sides stated that art 165(2) codifies the doctrine of necessity of which the *de facto* doctrine is a part.

98. On behalf of Mr. Harmon, in contradiction to the submissions outlined above, it was maintained that the NCM proceeding was a nullity because of the presence and voting by the second respondent. It was submitted that he could not have been nominated, and he could not have been elected so he could not have voted. As a result, the second respondent's vote was void *ab initio*. Mr. Forde explained that this meant that all his votes were null and void from the inception of his entry into the National Assembly. In this context, it was reiterated that this FDA

was therefore properly brought within the Court's constitutional jurisdiction and so an election petition did not have to be filed.

99. The **AG v Sam Condor** case (*supra*) was relied on. In this case, since the senator participated in the Parliamentary proceedings which he could not do as a fourth senator as the Constitution only provided for three senators, it is understandable why the entire proceedings in which he participated would have been ruled a nullity and therefore any legislation passed in which he voted would have been unconstitutional. This case can be distinguished because I have concluded that the NCM proceeding in itself was not unconstitutional. There is no evidence that the Leader of the Opposition was disqualified in any way from moving such a motion which art 106(6) permitted him to do. The NCM and Resolution 101 flowing from it did not breach the Constitution. The voting by the second respondent could not remove the validity of the NCM. Thus, unlike **AG v Sam Condor**, the National Assembly cannot be said to have been acting unconstitutionally.

100. To my mind, one cannot argue that the proceeding was unconstitutional but yet argue that the proceeding was not carried because of the presence of one unlawful vote. Thus, while advancing that the proceeding was a nullity, it was also submitted that for the purposes of the tally of the vote it should be accepted as being tied. But to do so would mean that one has to accept the proceeding as valid and then go on to deal with the vote before concluding that it should be 32-32. It does appear illogical to me to argue that the NCM proceeding was a nullity yet argue that the votes should be accepted as being 32-32 with the invalid vote being discredited. If the proceeding was unlawful, then the whole NCM goes and not just the vote in order to make it 32-32. These submissions are totally inconsistent. In my view, it is not the National Assembly as a body that acted unconstitutionally, but the second respondent who did when he sat as an MP who would not have been qualified due to his dual citizenship.

101. No doubt, this is why the contrary was argued for Reid and the AG that the NCM proceeding was lawful and valid, but not the second respondent's vote.

102. I also add: if the entire proceeding of the National Assembly on December 21st 2018 was a nullity, then perforce, all prior proceedings of the National Assembly in which the second respondent would have been present and voting would have to be deemed a nullity. While, as Mr. Forde said, it is not usual for a division to be called for in relation to the passage of legislation and budgets, so one would not know whether the second respondent would have

previously voted, if one were to accept his nullification argument, once it is ascertained that any MP who was disqualified had voted then it would mean that the proceeding and enactments flowing therefrom would be invalid.

103. I would also say in this regard that one would not be able to choose an issue such as e.g. a NCM, to say that a vote on that issue that one was displeased with becomes a nullity because of the serious consequences for the government of the day, while other matters, including national budgets, on which an unqualified member voted would remain intact. This is to approbate and reprobate. While I agree that continued illegality should not be permitted, whatever was done, a vote of an unqualified MP cannot and would not nullify that which has occurred in the past where the proceedings were lawful. In the context of this case, a party cannot be complicit in the perpetuation of an illegality and cry foul when things go wrong. Indeed, as was pointed out by both Mr. Datadin and Mr. Nandlall, if the second respondent had voted against the NCM, there would no doubt have been no contestation or protestation despite his dual citizenship, and Reid, the AG and Mr. Harmon would have counted his vote as valid. I note here that there was some prevarication in the different submissions on behalf of the supporters of the invalidity of the vote as to whether a 'no' vote would have been equally invalid.

104. There is another aspect of this case which is of importance and on which Mr. Forde relied. This is the effect of the disqualification on the holding of a seat in the National Assembly. Mr. Forde submitted that disqualification due to the second respondent's dual citizenship must result in an automatic vacancy of the seat such that the second respondent could not be said to have been eligible to vote at all. This is to say, that since he was unqualified to be elected in the first instance, his election is void and of no legal effect and that by operation of law his seat became vacant. He said that this flows from the fact that his nomination and election are void since he is in violation of the dual citizenship provisions of the Constitution. He cited the decision of Smith JA in **Dabdoub v Vaz**. However, I am of the view that the provision of our Constitution in this regard which is to be found at **art 156(1)(d)** (quoted earlier [59]) is different to that of the Constitution of Jamaica which provides in s 41(1)(d) that:

> "The seat of a member of either House shall become vacant –
>
> (d) If he ceases to be a Commonwealth citizen or takes any oath or makes any declaration or acknowledgement of allegiance, obedience or adherence to any foreign Power or State or does, concurs in or adopts any act done with the intention that he shall become a

subject or citizen of any foreign Power or State."

Justice Smith pointed out that while s 40(2)(a) speaks to disqualification for appointment or election, s 41(1)(d) provides for the position of a member who becomes disqualified after his appointment. (See paras 63 to 66). It is Mr. Forde's submission that the second respondent was both prohibited and disqualified from being an MP so that having ascertained his dual citizenship status, the second respondent ceases to be an MP and his seat is vacated. **Re Nash No. 2** [2017] HCA 52 (Dec 6, 2017), a case from Australia, was cited in support where it was stated that where a person is prohibited from sitting in the Parliament and where a person becomes disqualified after taking up their seat, the seat is automatically deemed to be vacant.

105. To my mind, however, the Australian provision as explained in **Re Nash No. 2**, which flowed from Ms. Nash's case which was included in **Re Canavan** (*supra*), and the Jamaican provision seem to indicate an automatic disqualification by operation of law though this can be challenged or be subject to court proceedings, while the Guyanese provision in **art 156(1)(d)** suggests that having been found to be a person who should be disqualified, it is for the MP to resign and thereby vacate his or her seat. Failure to do the honourable thing in so acting may result in a sanction by the National Assembly through the Speaker, removal by the representative of the member's list or an application by petition to the Court.

106. What I have gleaned from the Australian cases is that upon evidence of dual citizenship, the member's seat is considered to be vacant. Even where the member resigns as it was noted in **Re Canavan** (*supra*) where two of them did, the issue can be referred to the Court of Disputed Returns by a resolution of the house in which the issue arose, that is the Senate or the House of Representatives, for a consideration of each case and whether in fact the vacancy of the seat can be confirmed and how it is to be filled. This is not the case here.

Conclusion

107. **May on Parliamentary Proceeding** (24th edn. 2011, p. 235 - 236 explains "Proceedings in Parliament" thus:

> "The term 'proceedings in Parliament' has received judicial attention (not all of it in the United Kingdom) but comprehensive lines of decision have not emerged and indeed it has been concluded that an exhaustive definition could not be achieved. The primary meaning of proceedings, as a technical parliamentary term,

> which it had at least as early as the seventeenth century, is some formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognised by its inclusion in the formulation of article IX [of the Bill of Rights 1689]. An individual member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking."

108. I am of the opinion that the NCM was therefore conducted in a proceeding of the National Assembly. As noted above, there is no evidence that this proceeding was invalidly commenced. This proceeding would have involved the debate and the voting. As submitted by Mr. Nandlall, one cannot disaggregate or dissect the proceeding to say that a particular vote was unlawful. My interpretation of **art 165 (2)** has led me to conclude that if it could have been found that the second respondent was disqualified to be elected, the second respondent's vote could not have been nullified. The second respondent's vote, being the part of a lawful proceeding, would have been validated. **Article 165(2)** saves the actions of an MP which would otherwise have been nullified because of being unqualified. Despite the provisions regarding disqualifications of MPs for whatever reason, whether because of dual citizenship as contemplated by the Constitution or because one has crossed the floor, the Constitution nevertheless saves these votes from nullification. In this vein, if Mr. Forde's submission is accepted that the second respondent's vote would have been nullified *ab initio*, that is, from the time he entered the National Assembly, **art 165(2)** would operate to validate his votes in the interests of peace and good order of the society.

109. **Article 165(2)** provides that proceedings of the National Assembly are not invalidated by the presence or participation of a person not entitled to be there. This provision in effect is a codification of the doctrine of necessity, a proposition which Mr. Robertson accepted. I mention again, as noted above, that **art 58** does not speak to nullification of votes if made by a disqualified MP. Further, the seat occupied by the second respondent would not have thereby become automatically vacant. The automatic vacancy of a seat, as discussed in the Australian cases and in **Dabdoub v Vaz** is based the Constitutional provisions of Australia and Jamaica respectively, though the cases suggest that the issue of the vacancy of the seat and the

consequences flowing there from could still engage the attention of the Court. Thus, these cases can be distinguished on this issue and would not apply to Guyana.

110. Thus, I hold that the declarations sought at paras 1 and 2 are granted. The effect of these declarations is that anyone who holds dual citizenship as defined within the parameters of **art 155** (1)(a) as discussed above cannot lawfully be nominated or elected as an MP. The declaration sought at para (4) is refused for the reason given. While raising important points of constitutional law for clarification, the other declarations sought at paras (3), (5), (6) and (7) cannot be granted on the ground of lack of jurisdiction for the reasons outlined, though I have concluded by way of comment that these declarations could not have been granted in any event as the NCM proceeding was saved by virtue of **art 165(2)**.

111. Given my decision, the prayers at para 8 for an order setting aside the order of the Speaker that the NCM, Resolution 101 passed by the National Assembly on the 21st December, 2018, and at para 9 for a stay of the enforcement of the said Resolution and a conservatory order preserving the status quo ante that the Government remains in office are all moot and therefore cannot be granted.

112. Since this FDA has raised such major issues of national interest, I do not feel that the issue of costs needs to be addressed. The effect of dual citizenship on the ability of persons to be MPs has been the subject of much discussion and needed clarification; indeed Guyana has now joined the list of countries in which this issue has had to be addressed. The effect of the provisions regarding 'crossing the floor' suggests that they may need to be revisited as regards their enforceability. The issues in this FDA have consequences not just for this case, which flowed from the action of the second respondent, but for how the business of nominating and electing representatives for the National Assembly is to be conducted. It is apposite that they have been brought to the fore for ventilation and judicial consideration and adjudication.

113. I thank counsel for their industry and submissions which have assisted me greatly in delivering this decision.

Judgment accordingly that the declarations at paras (1) and (2) of the application are granted and that the declarations at paras (3),(4),(5),(6),(7),(8) and (9) are not granted. Given the constitutional issues that have been raised which speak to matters of national interest there is no order as to costs.

Roxane George
Chief Justice (ag)
January 31st, 2019