[2018] CCJ 17 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction
ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCV2017/008
GY Civil Appeal No 45 of 2015

BETWEEN
THE ATTORNEY GENERAL OF GUYANA **APPELLANT**

AND
CEDRIC RICHARDSON **RESPONDENT**

Constitutionality of alterations to the Constitution – implied alteration of constitutional provisions – introduction of additional qualifications for presidential candidature – constitutionality of presidential term limits – the relationship between presidential terms limits and the rights of the electorate in a sovereign democratic state – procedure for amending Articles 1, 9 and 90 of the Constitution of Guyana.

JUDGMENT SUMMARY

[1] Mr Cedric Richardson challenged the constitutionality of an amendment to Article 90 of the Constitution which added the further qualifications that a candidate for President of the Republic must be a Guyanese by birth or parentage, residing in Guyana on the date of nomination for election, continuously resident in the country for a period of seven years before nomination date and must not have served as President for two terms.

[2] Mr Richardson said that his right to choose whomsoever he wanted to be President, impliedly conferred by Articles 1 and 9, had been diluted by the alterations to Article 90 as it disqualified former President Bharrat Jagdeo who had previously served two terms as President. He applied for orders that would invalidate the amendment to the Constitution on the ground that the manner and form for altering Articles 1 and 9 had not been followed. To amend these Articles, the amendment had to be supported by a majority of voters in a referendum.

[3] The trial judge, Chang CJ (Ag), found in favour of Mr Richardson and his judgment was affirmed by a majority of the Court of Appeal (Chancellor Singh (ag) and Roy JA). Both courts relied on the U.S. Supreme Court decisions of *Powell v McCormack*[1] and

[1] 395 U.S. 486.

US Term Limits Inc v Thornton[2] and the Privy Council decision of *State of Mauritius v Khoyratty*[3] to conclude that an essential feature of a sovereign democratic state was the freedom enjoyed by its people to choose whom they wish to represent them. They held that the amendment, by excluding many persons as contenders for the Presidency, diluted the right of the people to elect a President of their choice inherent in Articles 1 and 9. A referendum was therefore needed in order to make such an amendment.

[4] In the Court of Appeal, Cummings-Edwards CJ (ag), as she then was, did not agree with the majority. She held, inter alia, that the Constitution bestowed upon Parliament the power to expand the categories of persons disqualified from running for President in Article 90 and that there was no need for a referendum in order for Parliament to do this. Mr Richardson, in her opinion, failed to displace the presumption of constitutionality of the amendments by establishing that when Parliament purported to amend Article 90 it was acting either in bad faith or had misinterpreted the provisions of the Constitution.

[5] The Attorney General appealed the decision of the Court of Appeal, relying heavily on the dissenting opinion of Cummings-Edwards CJ (ag). It was also submitted that the court was not entitled to assess whether the amendment was inconsistent with Articles 1 and 9 as the amending legislation did not purport to amend those Articles. Essentially, two issues were put before the CCJ in the appeal: (a) could Articles 1 and 9 be altered by implication? and if so (b) did the additional disqualifications change or dilute the rights of the electorate in the sovereign democratic state of Guyana as prescribed by those Articles?

[6] All seven judges of the CCJ heard the appeal. They upheld the constitutionality of the amendment by a 6:1 majority. All the judges of the Court agreed that Articles 1 and 9 could be altered by implication, however, their views varied on whether there had been implied alteration of the Articles. The majority decision was embodied in the separate judgments of President Sir Dennis Byron, Mr Justice Adrian Saunders and Mr. Justice Jacob Wit. A detailed dissent was delivered by Mr Justice Winston Anderson.

[7] President Byron said that there were three levels of entrenchment of provisions in the Guyana Constitution. The shallowest level allows for the alteration of certain provisions by an absolute majority of the National Assembly. The intermediate level allows for the alteration of provisions including Article 90 with at least a two-thirds (2/3) majority vote of all members of the National Assembly. The deepest level requires a referendum to alter provisions such as Articles 1 and 9. Only 10 Articles and four Schedules are subject to the deepest level of entrenchment, making it applicable only in exceptional circumstances which go to the fundamentals of the State.

---

[2] 514 U.S 779115 S. Ct (1995).
[3] (2007) 1 AC 80.

[8] President Byron said that the Constitution could have made the qualifications to be elected as President subject to the deepest level of entrenchment, but, by providing different levels of entrenchment for Articles 1 and 9 on the one hand and Article 90 on the other, the inescapable conclusion was that the framers of the Constitution did not envisage that altering the qualifications to be President would necessarily impact on democracy or the sovereignty of the people in Guyana. The proposition that altering the qualifications for President in Article 90 could require satisfaction of the procedure for altering Articles 1 and 9, which were entrenched at the deepest level, would itself change the structure of the Constitution. This principle was borne out in the case of *AG v McLeod*.[4] However, he warned that the court would be astute in applying this principle to ensure that any such alterations fall properly within the category of qualifications for the position.

[9] President Byron said the premise that Articles 1 and 9 implied an unlimited right to choose the Head of State was not obvious from the Articles. The statements in *Thornton and Powell* used to support that view were taken out of the context within which those statements were made. The establishment of qualifications for the position of President, was normal in democratic Constitutions and does not necessarily diminish substantive voter choice. Additionally, after rebutting the submission by counsel on behalf of Mr Richardson that the political theories of John Locke and the American philosopher Johnathan Mansfield supported the view that a core feature of a democratic state was the unrestrained freedom to select a representative, the President said that the concept of qualifications for office was not open ended and would include matters of age, citizenship, residence and term limits. In fact, only these issues, excluding age, were addressed by the amendments in Guyana. Had there been attempts to introduce unusual considerations to mask as qualifications then different principles for adjudication would arise.

[10] President Byron concluded by noting that it was clear from the history of the amendments that they did not emerge from the desire of any political party to manipulate the candidacy for the Presidency according to its agenda. It represented the considered opinion of the 1999 Constitutional Reform Commission after extensive national consultation of the national view on what was required to enhance democracy in Guyana, make the Constitution more relevant to the needs of citizens and reduce racial and political tensions in the country; and the amendments had national support. The amendments were a single item of a whole suite of Constitutional amendments designed to reflect the evolving democracy in Guyana.

[11] Some of the ideas expressed by President Byron were similarly proffered by Justice Saunders. For his part, Justice Saunders said that Articles 1 and 9, and the extent to which they have been deeply embedded in the Constitution, were prophylactics against

[4] [1984] 1 WLR 522.

abuse of Parliament's power to amend the Constitution and that the real issue in the appeal was whether the effect of the amendments was that Guyana could no longer be the democratic and sovereign state that it was prior to the passage of the amendments.

[12] Justice Saunders said that the suggestion that sovereignty meant that the people must be able freely to choose whomsoever they wish to govern them, and that prior to the amendment that was the case, was unsupported in constitutional theory and practice. Democratic governance allows for, indeed requires, reasonable restrictions to be placed on the qualifications to be a member of the National Assembly and hence also to be President. Even before the amendments, Article 90 stated that a presidential candidate had to be qualified to be elected as a member of the National Assembly pursuant to Article 155 which stipulated a range of restrictions on who may be so qualified.

[13] Justice Saunders said that the "Principles and Bases of the Political, Economic and Social System" laid out in Part 1 of the Constitution (of which Article 9 is a part), and their inclusion in the Guyana Constitution, were for the most part a constitutional feature borrowed from or at least similar to what is found in the Indian Constitution. After considering statements made by Dr Ambedkar (the venerable scholar and principal author of India's Constitution) at the Indian Constitution Conferences as well as Article 39(1) of the Constitution of Guyana, Justice Saunders concluded that it was true that Articles 1 and 9 do have "juridical relevance" and are not merely "idealistic references with cosmetic value only"[5]; however, they were not intended to confer *individual* rights. They were intended to guide governments, the courts, state and public bodies in the implementation of policy and the discharge of their functions. Mr Richardson was therefore misguided in seeking to found his case on the breach of a right contained in Articles 1 and 9 that supposedly inures to him as an individual.

[14] Justice Saunders also found that the submission that Articles 1 and 9 are breached whenever an additional disqualification is added, *whether or not it is felt that the disqualification may improve democracy as a whole* was flawed. That submission avoided any evaluation of the character of the amendments to Article 90 and therefore elevated form over substance. It specifically equates measures that lead to democratic decay with measures that strengthen democracy. It invites the court to disregard historical and surrounding context when assessing a possible violation of the normative statements contained in Articles 1 and 9. It cannot be the case that any and every new qualification or disqualification the National Assembly imposes on candidacy for public office automatically abridges democracy. Nor does the removal of an existing qualification inevitably expand democracy. It would be quite remarkable if democracy or sovereignty could be measured in such a manner. The status of Guyana as a sovereign and democratic state may be but is not necessarily implicated by an alteration of the qualifications established for election to the Presidency. When assessing whether

[5] See *AG v Mohamed Alli* (1987) 41 WIR 176 at 205(B).

Articles 1 or 9 has been breached, to simply calculate whether the amendment in question expands or reduces the pool of persons eligible to be elected as President would perfectly fit Professor de Smith's disparaging description of "tabulated legalism."[6]

[15] In giving guidance for future amendments, Justice Saunders said that parliament was entitled to adopt measures to satisfy itself that Guyana remains worthy of the designation "sovereign and democratic" after a proposed amendment. These measures will always be prompted and conditioned by the lived and past experiences upon which contemporary generations can draw. Ultimately, if Parliament enacts an amendment to Article 90 (or to Article 155) and no referendum is held, the Constitution reposes in the court the responsibility to assess whether to strike down the amendment if it implicates Articles 1 and/or 9 because it dilutes democratic governance.

[16] Where the court is called upon to determine whether a particular amendment establishing new qualifications was within or outside the power of the National Assembly acting on its own without a referendum, Justice Saunders said that the court should look to the history, substance and practical consequences of the amendment, to the reasons advanced for it and to the interests it serves. The court may also consider, albeit of lesser importance, whether it was passed by a bare two thirds majority with one third of the members being vigorously opposed to it or whether it was instead passed unanimously. The court was entitled to look outside Guyana to other states within the Caribbean Community, all of whose members subscribe to the tenets of liberal democracy and assess whether the disputed Act entirely was out of sync entirely with what obtains throughout the Community. The court may also look to the wider international community and draw on "the collective wisdom and experience of courts the world over."[7] Transnational constitutionalism may provide guidance as to whether a particular constitutional amendment is abusive or consistent with what should obtain in a sovereign and democratic state. Ultimately, the court must ask itself whether the new qualifications are reasonably justifiable in a democratic society. That is the litmus test. In its review exercise the court is entitled to receive evidence and materials and take judicial notice of facts that bear on these matters.

[17] Upon applying these principles in this case, Justice Saunders formed the view that the restrictions introduced by the amendment to Article 90 were found in many States that are liberal democracies. Where members of the National Assembly considered that term limits and the other amendments made to Article 90 did not dilute Article 1 or 9, he said the courts should look for some evidence to the contrary before concluding that such a view was wrong-headed. Where such evidence exists, courts will not shrink from

[6] See S A de Smith, *The New Commonwealth and its Constitutions* (1964) at p 194, cited by Lord Wilberforce in *Minister of Home Affairs v Fisher* (1980) AC 319 at 328.
[7] See *R v Spence* Criminal Appeal No 20 of 1968, St Vincent and the Grenadines, unreported, 2 April 2001 at [214].

deciding that the amendment is invalid unless affirmed by a referendum. But here, no such evidence whatsoever was put forward by Mr Richardson.

[18] In his judgment, Justice Wit said it was necessary to focus on objective, international standards of what a democratic state entails. He therefore considered relevant international treaty provisions, jurisprudence of the Inter-American Court of Human Rights and a very persuasive report on presidential term limits by the European Commission for Democracy Through Law (the "Venice Commission"). He concluded that according to the international standards, residence requirements are allowed provided they are reasonable. Limits on re-election also pursued the aim of preserving democracy and protected the human right to political participation. Term limits contributed to guaranteeing that periodic elections were "genuine" and to ensuring that representatives are freely chosen and accountable. The introduction of term limits did therefore not dilute or water down the democratic status of Guyana. He did say, however, that the restriction that only citizens by birth or parentage qualify for the presidency of Guyana would at first blush seem discriminatory or at least controversial[8] but this aspect of the case was never fully developed and so he did not give a definitive conclusion on that point.

[19] In his dissenting judgment, Justice Anderson said that the crucial issue for decision was whether Articles 1 and 9 guaranteed to the people of Guyana the right to freely choose their President. He said that these provisions were akin to human rights provisions and are therefore to be given a generous, liberal and purposeful construction. Article 154A of the Constitution confers upon the citizens of Guyana the human rights enshrined in the international treaties to which Guyana has acceded and which are set out in the Fourth Schedule. These rights must be respected and upheld by the executive, legislature and, very importantly, the judiciary. Among the treaties listed in the Fourth Schedule is the International Covenant on Civil and Political Rights.[9] Article 25 of the Covenant affirms the right and opportunity of every citizen (a) to take part in the conduct of public affairs, directly or *through freely chosen representatives*; and (b) to vote and be elected at genuine periodic elections guaranteeing the free expression of the will of the electors. Similar expressions are to be found in Article 20 of the American Declaration of the Rights and Duties of Man 1948[10] and Article 23 of the American Convention on Human Rights 1969.[11]

---

[8] CCPR General Comment No. 25: Article 25 at [3]. It does not assist in this respect to refer to the Constitution of the USA, where only a "natural born citizen" can become President, which made sense at the beginning of the new Republic but nowadays is seen as controversial, see Sarah Helene Duggin and Mary Beth Collins, *'Natural Born' in the USA: The Striking Unfairness and dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, Columbus School of Law, 2005

[9] (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[10] OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System OEA/Ser L V/II.82 Doc 6 Rev 1 at 17 (1992).

[11] OAS Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

[20] Having regard to these treaty provisions and the legal literature by Mansfield and Professor Simeon McIntosh as well as the decisions of the United States Supreme Court in *Powell* and *Thornton*, and the Privy Council decision in *Khoyratty*, Justice Anderson was persuaded that the recognition in Articles 1 and 9 that sovereignty belongs to the people who exercise it through their representatives necessarily entails the corollary that the people are free to choose who their representatives will be, free that is, from any constraints not imposed by the people themselves. This was consistent with a generous and liberal interpretation of the Articles.

[21] In the sovereign democratic state of Guyana in which sovereignty belongs to the people, the people have supreme power or authority to govern themselves. This implies the right to self-determination, or as the Preamble to the Constitution states, it affirms the sovereignty and independence of the people. These pre-existing rights may be enlarged but cannot be constricted by the executive, legislative or judicial organs of the state; organs which derive their legitimacy from the sovereignty of the people as expressed in their Constitution. There is an irrebuttable presumption that the people know who would best represent their interests in government. They are the ones to decide upon the suitability and categories of qualifications of persons to stand for office. The imposition of restrictions that disqualify large numbers of persons from standing for election as President, which restrictions are not sanctioned by the people in the constitutionally authorized manner, necessarily trenches on their freedom to choose their representatives and is concomitantly a fetter upon their sovereignty.

[22] Justice Anderson went on to say that it may be true that certain modern notions are thought to be more conducive to democracy than older notions, however, unless these notions have attained the status of *jus cogens* they cannot be determinative. It was not for the judges "to give effect to these modern notions by purporting to give an updated interpretation to the Constitution. The Constitution does not confer upon the judges a vague and general power to modernize it… the power to make a change is reserved to the people …, acting in accordance with the procedure for constitutional amendment. That is the democratic way to bring a constitution up to date."[12]

[23] In his opinion, the amendment was therefore unconstitutional because it disqualified five categories of persons from standing for the post of President who were not previously so disqualified without the approval of the people in a referendum in accordance with Article 164. The new categories of disqualification probably resulted in the exclusion of thousands of otherwise eligible Guyanese citizens from being elected as President of the Republic. The freedom of the Guyanese people to elect as their President the person whom they consider best able to do the job was clearly substantially curtailed. It was no answer to say that the people are free to choose from those persons not excluded by the Act. Nor was it an answer to say that Guyana remains

[12] See Lord Hoffman in *Boyce v The Queen* [2005] 1 AC 400 at [29].

a democratic sovereign state after the passage of the amendments. The question was not whether Guyana remained a democratic sovereign state, rather, it was whether the amendments diminished or watered down the rights vested in the people as recognized in Articles 1 and 9. He was persuaded it did.

[24] Although acknowledging that the amendments were the result of laudable efforts at political consensus and it was clearly inconvenient to strike down an important legislative fruit of the agreement that was reached on that occasion, Justice Anderson said that inconvenience was neither the test, nor an exception to the test, of the constitutional requirement. The Court was required to guard the constitutional requirement for the holding of the referendum as prescribed by the framers of the Constitution whatever the degree of inconvenience.

[25] Justice Anderson did not accept that the delay of 14 years in bringing the constitutional motion was relevant on the facts of this case. Whilst conceding that the length and nature of a delay could be such that no one had standing to challenge the constitutionality of an Act, he considered that as the matter of delay was not raised in the lower courts it would be unfair for it now to be considered by the CCJ. He would dismiss the appeal and order the severing of section 2 of the Act.

[26] Having regard to the judgments above, the Court, by a majority decision, allowed the appeal, set aside the orders of the courts below and declared that section 2 of the Constitution (Amendment) (No 4) Act of 2000 was a constitutional amendment to Article 90 of the Constitution of Guyana having been validly enacted. The Court made no orders as to costs.