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FOREIGN ALLEGIANCE AND THE DISQUALIFICATION OF PARLIAMENTARIANS

Dr. Lloyd Barnett, O.J. - Attorney-at-Law
Stacey-Ann Soltau-Robinson - Attorney-at-Law

THE ENACTMENTS

1. There are two constitutional provisions related to foreign allegiance which affect parliamentary candidacy and Parliamentary membership:

Section 40(2) of the Constitution states:

"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;

Section 41(1) states:

"The seat of a member of either House shall become vacant –

- (a) upon the next dissolution of Parliament after he has been appointed or elected:

.....

- (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;"

2. The first quoted provision is directed at the qualification for electoral candidacy. It must be read together with section 23(2) of the Representation of the People Act which states:

"Any ten or more electors qualified to vote in a constituency for which an election is to be held may nominate any person qualified to be a member of the House of Representatives as a candidate by signing a nomination paper in the form set out in the Second Schedule and causing such nomination paper to be handed to the returning officer between the hours referred to in subsection (1)."

3. The second quoted constitutional provision is directed at vacating the seat of a member who subsequent to his election becomes disqualified. This subsection assumes that the Member was eligible at the time of his election but has subsequently become disqualified. There is a significant variation in its terms in that it specifically deals with an application to become a citizen of a Foreign State.
4. The following three major questions of interpretation arise out of these constitutional provisions:
 - (1) what constitutes "allegiance, obedience or adherence";
 - (2) what conduct is to be treated as amounting to one's "own act";
 - (3) what constitutes a foreign power or State".

If a person who has gained the majority of votes is proved to have been disqualified at the time of nomination an important consequential question arises, namely should the person who obtains the second largest number of votes be awarded the seat or should there be a by-election.

FOREIGN ALLEGIANCE

5. "Allegiance" is defined in the *Shorter Oxford English Dictionary* as "the relation or duties of a liege-man to his lord; the tie of a subject to his sovereign or government". *Webster's New World Dictionary* defines "allegiance" as "1. the duty that was owed by a vassal to his feudal lord and 2. The obligation of support and loyalty to one's ruler, government or country". Since the feudal system was never present in Jamaica or the other Commonwealth countries outside of Britain, the first part of these definitions is clearly inapplicable. *Stroud's Judicial Dictionary* states that "allegiance" is such natural or legal obedience which every subject owes to his Prince". (termes de la ley).
6. In British constitutional law allegiance is due to the Sovereign in both her natural as well as regal or political capacity. Historically and formally there is an element of obeisance as well as obedience. The classic doctrine is that allegiance is due from all British subjects and British nationals wherever they may be. This would include Jamaicans whether in the UK, in Jamaica or elsewhere. *McDonald's Case* (1747) 18 State Tr. 857; *R v. Casement* [1917] 1 K.B. 98(137).
7. It appears that the constitutional formulation in Jamaica has used the widest possible terms because it speaks of "obedience" or "adherence". These words are not only very flexible but have been used in a disjunctive manner. It must be

doubted however whether they can reasonably be given their normal, wide meaning. For instance the holder of a US "green-card" has to comply strictly with the US Immigration regime and is probably in a sense more subjected to governmental control and direction than a naturalized citizen. Indeed, even a tourist on entering a foreign country is under an obligation of obedience to the laws of the foreign country. It seems therefore that the original concept of supporting or being devoted to a sovereign or State in a manner which imports an obligation to be loyal to and be of assistance to that State in any matter of conflict with other States ought to be considered as the appropriate test.

8. The doctrine of allegiance has historically been expanded in the criminal law in an effort to provide the Courts with jurisdiction to deal with serious crimes and to strengthen the country's fight against the enemy in wartime. In *R. v. Tchorzewski* (1858) 8 State Tr. N.S. 1091, Campbell, C.J. held that it is a crime on the part of a foreigner owing temporary allegiance to the Crown of England, through residence in the country, to plot and conspire for the Commission of a crime in a foreign country. In the famous *Lord Haw Haw* case of the Nazi propagandist, the House of Lords held that the appellant who had been born in the US, the son of a naturalized American citizen, began living in England at age 16 and at age 27 made an application for a British passport describing himself as a British subject by birth and was granted a passport, owed allegiance to the British King. From the reasoning of the House of Lords it is clear that their Lordships' treated residence in England as creating a temporary allegiance and application for the grant or reward of a passport as a more significant act, indicating that the holder of such a passport had taken all steps to insure every assistance and protection which he may need and to ensure his right of re-entry into England. *Joyce v. DPP* [1946] 1 A.C. 347.
9. The terms which governments employ in issuing passports do not normally suggest that it has such far reaching implications. In the Jamaican passport for instance it contains a request and requirement by the Minister of Foreign Affairs on behalf of the Government of Jamaica to "all those to whom it may concern to allow the bearer to pass freely without let or hindrance, and to afford the bearer such assistance and protection as may be necessary". It contains no pledge of protection by the Jamaican government and the request for unhindered passage is inapposite in this age of restrictive immigration law and policies.

BY VIRTUE OF HIS OWN ACT

10. The term "by virtue of his own act" is tolerably clear at least in a negative sense. If a person is born of Jamaican or Commonwealth parents in a foreign country

and so obtains a foreign nationality by birth and he is taken to Jamaica as a child and does nothing such as applying for a non-Jamaican passport, it seems quite clear that he would not be disqualified. If on the other hand, he applies for a passport from his country of birth he might by "his own act" have done something to acknowledge allegiance to another State.

11. It appears that the test must be objective. For instance, If A in the scenario just described applies as an adult for a passport from Venezuela but the only reason he does so is to obtain admission to a University there, where the Government of Venezuela pays all the tuition fees for their nationals but he still regards himself as a Jamaican and is a member of the Jamaican Hockey Team he may on this approach nevertheless be disqualified. He would certainly be disqualified if he were required in his passport application to pledge allegiance to Venezuela.

12. In *Chaitan v. Attorney-General* (2001) 63 W.I.R. 244, the Court of Appeal of Trinidad and Tobago was concerned with the interpretation of section 48(1) of that country's Constitution which provides:

"No person shall be qualified to be elected as a member of the House of Representatives who –

(a) is a citizen of a country other than Trinidad and Tobago having become such a citizen voluntarily, or is under a declaration of allegiance to such a country;"

The Court held that the section applied in cases of dual citizenship where the foreign citizenship was obtained voluntarily. Nelson, J.A. at p. 377 stated:

"There appears to be good reason why this country since 1962 has insisted that its legislators have undivided loyalty to this country."

13. In *Dabdoub v. Vaz et al*, Claim no. 2007, HCV63921 (April 11, 2008) McCalla, C.J. held the successful candidate to have been disqualified because although he had acquired US citizenship by birth and therefore involuntarily, he had maintained and renewed his US passport and travelled on it to various countries and on several occasions he had presented himself to Immigration Authorities as being an American citizen with an understanding of his obligations as such. Her Ladyship did not indicate whether it is the accumulation of these actions that the disqualification came into being and there seems no basis on that interpretative approach to contend that it requires more than one act of acknowledgement to produce the result.

FOREIGN POWER OR STATE

14. The meaning of "Foreign Power or State" poses special problems in relation to the Commonwealth. The word "foreign" in its ordinary and normal meaning connotes another country situated outside one's own country. Such a wide definition would include all Commonwealth countries. The Constitution does not provide a definition of "foreign Power or State". Chapter II which deals with citizenship has a definition of a different phrase namely "foreign country" which applies expressly only to Chapter II. That definition includes any country that is not part of the Commonwealth. The countries which are part of the Commonwealth are enumerated by the Constitution and by statute.
15. There is a strong argument in favour of the view that in Chapter V of the Constitution which deals with Parliament and in which the disqualifying sections fall, the term "foreign power or State" should be given a meaning which excludes Commonwealth countries. The Constitution itself gives special significance to Commonwealth citizens. An adult Commonwealth citizen with twelve months of residence in Jamaica is qualified to be an elector and to be elected to the House of Representatives or to be appointed to the Senate. **ss. 37, 39.**
16. It is not possible to base this liberal construction on the traditional doctrine of "common allegiance" as the incongruous results would be that citizens of Dominica, Guyana and Trinidad and Tobago and Ghana would be disqualified while citizens of Barbados, Antigua and New Zealand would not be. It seems that the argument gives support for the fact that the term "foreign" has not in practice been applied to Commonwealth countries.
17. Jamaican legislation is consistent with this approach. The Jamaican Nationality Act which was brought into operation on Independence Day, August 6, 1962 and provided in accordance with the Commonwealth consensus for local citizenship defines "foreign country" as meaning "a country (other than the Republic of Ireland) that is not part of the Commonwealth". This Act gives persons who are citizens of such Commonwealth countries and ordinarily resident in Jamaica, the right to apply for registration as a Jamaican citizen. The Act also gives "aliens" who by definition are not Commonwealth citizens the right to apply for a certificate of naturalization. What is significant is that such a naturalized citizen is required to take an oath of allegiance to the Queen and to observe the laws of Jamaica in order to become a citizen of Jamaica. However a Commonwealth citizen who is registered as a Jamaican citizen is not required to take such an oath.

18. The Foreign Nationals and Commonwealth Citizens (Employment Act) which was enacted in 1964, only 2 years after Independence adopted the definition of Commonwealth Citizens in Chapter II of the Constitution and defines "foreign national" as "not including Commonwealth citizens", while at the same time subjecting them to the work permit regime.
19. In the Judgments (Foreign)(Reciprocal Enforcement) Act which had been passed from 1923, foreign judgments are treated as not including the judgments of Commonwealth courts and a specific provision is made for the application of the registration system which applies to foreign judgments to be extended to Commonwealth judgments. Simultaneously, the Judgments and Awards (Reciprocal Enforcement) Act was passed which specifically dealt with judgments of the Courts of the United Kingdom and then provided on the basis of reciprocity for the registration of judgments from other Commonwealth countries in the same way. In 1973 this Act adopted the definition of Commonwealth provided by Chapter II of the Constitution.
20. This approach leads to the conclusion that "foreign" is for these purposes synonymous with "alien". In this sense an "alien" or "foreign national" is a person who is not a citizen of the United Kingdom and colonies or a scheduled Commonwealth country or the Republic of Ireland.
21. In the British Nationality Act 1948 which led the way in the formulation of Commonwealth nationalization legislation, the term "foreign country" is used in the sense of countries other than Commonwealth countries or the Republic of Ireland. ss. 31-33.

BY-ELECTION OR NO BY-ELECTION

22. In the event the candidate with the highest number of votes is disqualified, should the candidate with the second highest number of votes receive the seat without the necessity of a by-election or is one necessary?
23. The Jamaican courts, applying English cases, have stated that in order for the candidate with the second highest number of votes to take the seat, it must be established that the votes given to the disqualified candidate were "thrown away" or should not be counted as, before voting, the electors who voted for the disqualified candidate had notice of the facts creating the candidate's disqualification: *Mattison v. Junor and Others* (1977) 15 JLR 194, even if the source of the notice is the opposing candidate: *re Parliamentary Election for Bristol South East* [1964] 2 QB 257.

24. Disqualification may be based on the status (for example infancy) or conduct of the disqualified candidate and the throwing away of votes is more likely to be found by the Court in the former instance: *Drinkwater v. Deakin* (1874) 9 LRCP 626. The two categories fall along a continuum. At one end of the continuum is, as it relates to the facts in question, "certainty" and at the other "uncertainty". It appears that "conduct" disqualification based on section 40 (2) of the Constitution of Jamaica may fall on the uncertainty end of the continuum if the notice in question does not specify the particular act of acknowledgement, namely the disqualified candidate's application for renewal and travel on his foreign passport as an adult in circumstances of uncertainty, namely where at the relevant time the requisite authorities contradicted the facts grounding the disqualification: *Dabdoub v. Vaz et al*, Claim no. 2007, HCV63921 (April 11, 2008). A by-election would, therefore, be required as the second candidate/ petitioner would be unable to pass this initial "notice" hurdle.
25. If the second candidate can pass this hurdle, however, applying the "votes thrown away" principle, "the votes given for him may be treated as having been thrown away, since they were perversely and willfully given..." to the disqualified candidate: *Hobbs v. Morey* [1904] 1 K.B. 74 at p. 78 as endorsed in *Mattison* (supra) at p. 198.
26. It should be noted at this juncture that Her Ladyship, albeit obiter, in *Dabdoub v. Vaz et al* stated that the "votes thrown away" principle would apply where, "...the electors have due notice that a candidate *is disqualified* (emphasis added)"(at p. 45). Her Ladyship then proceeded, wrongly it is respectfully submitted, to rely on *Mattison* (supra) as authority for this proposition even though *Mattison* (supra) had established that a petitioner need only establish the facts which would entail disqualification, and not that the electors were aware that the candidate was in law disqualified.
27. Of particular import for present purposes is the assumption inherent in this aspect of the application of the "votes thrown away" principle, which creates some disquiet. The assumption is that electors with notice before voting would have behaved in a particular manner, ie wilfully and perversely, in voting for the disqualified candidate especially since it is not necessary to establish that these voters knew that the relevant facts would entail disqualification: *Mattison* (supra) as the Court will merely assume he understands that his vote will be considered void and the next candidate elected.

As was stated by Smith, C.J. in *Mattison* (supra) at p. 201 G – H:-

“I am willing to accept that the better opinion is that the electors need not know that facts told to them would entail disqualification, although it seems contrary to commonsense. It seems to me that what should be required is that the electors should be advised,. “Look, you are throwing away your votes if you vote for that man because he is not qualified.” If you tell a Jamaican elector that a man’s name appears on two voter’s lists he probably will ask you: “So what?” Because, perhaps, this is not uncommon. There should be a further requirement that he should know that if he votes for that man, his vote can be thrown away because that amounts to a disqualification.....”

This dictum is, however, important for two other reasons. Firstly, it may suggest that the “votes thrown away” principle is not infallible, and seems to insist that any assumption of a voter’s conduct in this regard must be fair. Secondly, it signals a necessary sensitivity to local circumstances and more particularly the Jamaican voter in the examination of what is fair in this regard.

28. Fairness, it is submitted, is not an abstract concept disassociated from the reality within which the Jamaican voter proceeds to attempt to participate in the electoral process, itself a crucial component of the democratic construct of the country’s political system. Instead, the issue of what is a fair assumption is derived from this context.
29. The Constitution of Jamaica does not state that the right to vote is a fundamental right although in section 38 (1) (a) it recognises “any person *entitled to vote*” (my emphasis). McIntosh, however, has stated, according to Kateb, that along with the legal procedure of the due process of law “the filling of political offices through contested elections held at suitably frequent intervals, decided by the majority, on the basis of universal adult suffrage [is one of] the most important procedures of constitutional democracy”: McIntosh, Simeon C.R., Caribbean Constitutional Reform, Rethinking the West Indian Polity, p. 231. He further states that “...the electoral system of constitutional democracy accommodates values by giving citizens the opportunity to the morally valuable and enriching experience of choosing their political leaders: McIntosh (supra), p. 231. Jamaica as a constitutional democracy would, it is submitted, embody the right to vote as a part of its foundational construct in these terms.
29. The Constitution of Jamaica does set out qualifications for registration as an elector as well as the bases on which a person is not qualified to be so registered: ss. 37 and 38 respectively. It is submitted that these sections implicitly

recognise or, at the very least, generally leaves intact the right to vote in Jamaica.

30. What is a *fair* assumption to be made from a Jamaican elector voting for a disqualified candidate must, therefore, be considered against the backdrop of the importance of this attribute of Jamaican constitutional democracy. It is submitted that the application of the "votes thrown away" principle compromises the citizen's right to participate in the election of members of the House of Representatives in Jamaica as it invites the Court to apply an artificial construct without considering the attributes of the Jamaican voting population.
31. The Jamaican courts had in 1944 recognised the high degree of illiteracy among electors at that time: *Bloomfield v. Benjamin* 4 JLR 247 at p. 249 per Watts J., and attempts have been made to facilitate these voters within the voting system by, for instance, the use of symbols on the ballot paper: Barnett, Lloyd, The Constitutional Laws of Jamaica, p. 204. The Population Census 2001 – Jamaica (Volume One) issued by the Statistical Institute of Jamaica has indicated that in 2001 of individuals fifteen years old and over, 0.6% had received no schooling; 0.3% had received up to pre-primary school education; 25.5% had received up to primary school education, while 55.6% had completed up to secondary education. It, therefore, appears that while there may not be the high levels of illiteracy that existed in Jamaica in 1944, in 2001 (a mere seven years ago) approximately 81% of this portion of the population had not received any education beyond the secondary school level. What this may indicate is that the typical Jamaican voter falls into this 81%.
32. The *fairness* of the assumption that such a voter would willfully and perversely proceed to vote for a disqualified candidate ultimately to the benefit of a candidate he does not support is questionable. It is submitted that this assumption presupposes a "sophisticated intellectualisation" of the issue even though the statistics may suggest that he is more likely to proceed with the reasonableness of the ordinary Jamaican voter. Guided by reason, the Jamaican voter may be more reasonably inclined to be suspicious of pronouncements by an opposition candidate of "facts" supporting his candidate's disqualification, especially in circumstances where there is the absence of confirmation by the requisite authorities and the disqualified candidate's name remains on the ballot. The assumption, it is opined, is therefore, *unfair*.
33. In summation, it is suggested that the "votes thrown away" principle is mechanically unrelated to local circumstances particularly the Jamaican voter,

and its application serves to undermine Jamaica's constitutional democracy. It would seem that the only alternative in circumstances where the candidate with the highest number of votes is disqualified is to hold a by-election. This would certainly avoid a situation in which a candidate, in the words of Smith, C.J., in *Mattison* (supra) at p. 202 "for whom the majority of [voters] did not cast their votes" assuming the seat and reaffirm the elector's right to vote for his political representative.
