IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007 HCV 03921

BETWEEN	ABRAHAM DABDOUB	CLAIMANT/PETITIONER
AND	DARYL VAZ	1ST RESPONDENT
AND	CARLTON HARRIS	2ND RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	3RD RESPONDENT

Gayle Nelson, Jaleel Dabdoub and Winston Taylor instructed by Gayle Nelson & Company for the Claimant/Petitioner

Ransford Braham and Mrs. Suzanne Risden-Foster instructed by Messrs Livingston, Alexander & Levy for the First Respondent

Mrs. Nicole Foster-Pusey and Miss Simone Pearson instructed by the Director of State Proceedings for the Second and Third Respondents

HEARD: October 31, December 4, 5, 9, 11, 13, 14, 17, 18, 19, 20, 21, 28 and 31, 2007

January 3, 4, 7, 8, 9, 10, 21, 29, 30, 31, February 7 and April 11, 2008

McCALLA, C.J.

INTRODUCTION

1. On October 1, 2007 the claimant Abraham Dabdoub (the petitioner) filed an Election Petition by way of a Fixed Date Claim Form in which he seeks reliefs against Daryl Vaz (the first respondent) as well as Carlton Harris (the second respondent) and the Attorney General (the third respondent).

The claim arose out of the General Elections which were held in Jamaica on September 3, 2007. Candidates were nominated in all 60 constituencies. The first respondent was nominated on August 7, 2007 as the candidate for the Jamaica Labour Party and the petitioner was the candidate for the People's National Party. They were contestants in the constituency of West Portland. The first respondent was declared the winner and was sworn in as a member of the House of Representatives. The second respondent was the Returning Officer for that constituency . The third respondent was sued pursuant to the provisions of the Crown Proceedings Act.

The petitioner seeks the following reliefs:

1. A determination that the first respondent was, on the 7th August, 2007 not qualified to be elected to the House of

Representatives including for the constituency of West Portland.

2. A determination that the nomination of the first respondent on the 7th August 2007 is invalid, null and void and of no legal effect

3. A determination that the claimant/petitioner, being the only qualified validly nominated candidate on the 7th August 2007, was and is entitled to be returned to the House of Representatives as the duly elected member for the constituency of West Portland.

4. An order that the claimant/petitioner be returned as the duly elected member of the House of Representatives for the constituency of West Portland.

5. A certificate directed to the Speaker of the House of Representatives pursuant to section 20(f) of the Election Petitions Act that the first respondent was not duly elected or returned and that the claimant/petitioner is the duly elected and duly returned candidate for the constituency of West Portland.

6. Alternatively, the claimant/petitioner claims a determination that the first respondent did breach Sections 91 and 92 of the Representation of the People Act and that the said election be declared null and void

7. A Certificate of Costs

> Such further and/or other relief as this Honourable Court shall deem just.

The relief claimed at 6 above was not pursued.

The main issue before this Court for determination is whether or not having regard to the provisions of Section 40(2)(a) of the Jamaican Constitution the first respondent is qualified to be elected to the House of Representatives.

The petitioner contends that the first respondent is not so qualified as he is a citizen of the United States of America, a foreign Power, and is under an acknowledgement of allegiance, obedience or adherence to that country having applied for, renewed and travelled on his United States passport to various countries noted in it, before and after his nomination. The petitioner is also contending that as the first respondent is not qualified to sit in the House of Representatives votes cast for him have been wasted or thrown away and the petitioner is entitled to be returned to the House of Representatives as the duly elected Member of Parliament for West Portland.

The first respondent was born in Jamaica. His mother is a United States citizen and she registered his birth at the United States Embassy in Jamaica and as a child he was added to his mother's passport. He contends that he has never taken an oath of allegiance to the United

States of America and is not, by virtue of his own act under any acknowledgement of allegiance, obedience or adherence to a foreign Power or State.

Constitutional Provisions for Qualification and Disqualification

Section 39 of the Jamaican Constitution sets out the qualification to be appointed as a Senator or elected as a member of the House of Representatives as follows:-

> "Subject to the provisions of section 40 of this Constitution, any person who at the time of his appointment or nomination for election –
>
> (a) is a Commonwealth citizen of the age of twenty-one years or upwards; and
>
> (b) has been ordinarily resident in Jamaica for the immediately preceding twelve months,
>
> shall be qualified to be appointed as a Senator or elected as a member of the House of Representatives and no other person shall be so qualified".

Section 40 of the Constitution sets out all the disqualifications for membership in the Houses of Parliament. The section is reproduced hereunder in part as follows:-

> "40 (1) No person shall be qualified for election as a member of the House of Representatives who-
>
> (a) is a member of the Senate;

(b) .....

40 (2) 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 acknowledgement of allegiance, obedience or adherence to a foreign power or state;" (Emphasis added)

Section 40 (2) enumerates a number of persons who are disqualified for membership in the Houses of Parliament.

Section 41 deals with the circumstances in which the seat of a member of either House becomes vacant. The first respondent has been sworn in as a member of Parliament but this section is not applicable since the Election Petition challenges the first respondent's qualification to be elected on the basis of section 40 (2) (a) of the Constitution.

Section 44 of the Constitution makes provision for the determination of the question relating to the validity of the election or appointment to the House of Representatives or the Senate or whether a member has vacated his seat in either House.

The issue of the qualification of the first respondent for membership in the House of Representatives is dependent on the answer to the

question as to whether or not the first respondent is "by virtue of his own act" under any acknowledgement of allegiance, obedience or adherence to a foreign Power or State and therefore not qualified to be elected to the House of Representatives, having regard to the provisions of section 40(2) (a) of the Constitution.

If the Court determines that the first respondent is not qualified then the question arises as to whether or not notice of disqualification was given to the electors of the constituency of West Portland. If such notice was given then the petitioner would be entitled to be returned as the duly elected Member of Parliament for that constituency. If notice as required by law was not given then the electors of the constituency would be entitled to choose their representative in a by-election.

The Interpretation of the Constitutional Provisions

In their submissions learned Counsel for the petitioner and the first respondent made reference to the legislative historical background against which the Court should consider the interpretation of section 40(2)(a) of the Constitution.

Mr. Gayle Nelson, Counsel for the petitioner and Mr. Ransford Braham Counsel for the first respondent in their respective submissions

have urged that the interpretation of Section 40(2) (a) is supported by history.

The petitioner traced the history of the section going as far back as the United Kingdom Act of Settlement in 1701, the Canadian Union Act of 1840 and the British North American Act 1867 which used words such as "declaration" "acknowledgement" and "allegiance". He made reference to section 44 (i) of the Australian Constitution of 1901 which states:-

> "any person who –
> is under any acknowledgment of allegiance, obedience or adherence to a foreign power, or is a subject or a citizen, or entitled to the rights and privileges of a subject or citizen of a foreign power..... shall be incapable of being chosen or of sitting as a Senator or member of the House of Representatives."

Mr. Nelson alluded to the interpretation placed on the words "is under any acknowledgment of allegiance, obedience or adherence to a foreign power" by decisions of the Australian Court as well as authors who have written on the subject. He referred to an article by Michael Pryles titled "Nationality Qualifications for Members of Parliament" published in (1982) 8 Monash University Law Review 163, 177 in arguing that "allegiance" may refer to allegiance owed by virtue of having formal citizenship of a foreign country but "allegiance" can also be demonstrated by other acts without even taking formal citizenship.

He relied on the Australian case of **Sykes v Cleary** (No. 2) (1992) 176 CLR 77, 127 in submitting that the words "is under any acknowledgement of allegiance obedience or adherence to a foreign power" involve an element of acceptance or at least acquiescence on the part of the relevant person.

He submitted that an "acknowledgement of allegiance to a foreign power" includes having citizenship and holding a foreign passport and said that in the present case the first respondent has made an acknowledgement of allegiance both by positive acts and through acquiescence. Citing numerous articles from the Australian jurisdiction, Mr. Nelson contended that the words "acknowledgement of allegiance to a foreign power" include being a subject or citizen of a foreign power and being someone entitled to the rights or privileges of a subject or citizen of a foreign power.

Counsel made reference to the relevant Constitutional provisions of other Jurisdictions including that of the Republic of Trinidad and Tobago where section 48(1) of that Constitution is similar to section 40(2)(a) of the Jamaican Constitution.

He finds support in the Judgment of Nelson J.A. in **Chaitan v Attorney General** (2001) 63 WIR 244 at 377 where he states:

> "In my view the phrase under a declaration of allegiance to such a country in section 48 (1) (a) of the Constitution embraces the three categories referred to by Brennan J .... (in **Sykes vs Cleary**) (supra)."

Mr. Ransford Braham Counsel for the first respondent, drew the Court's attention to section 8 of the Jamaican Constitution as it stood prior to an amendment in 1999, whereby persons who voluntarily acquired citizenship or took advantage of any right belonging to a citizen of a foreign country in that country, could lose their citizenship at the discretion of the Governor General. Section 3(1) of the Constitution provides that a person may become a citizen of Jamaica by birth, registration or descent. The Jamaican Constitution as amended clearly allows dual nationality by virtue of section 8 which states:

> "No person who is a citizen of Jamaica by virtue of sections 3(1) (a) (b) or (c) shall be deprived of his citizenship of Jamaica."

He urged that section 40(2) (a) should be interpreted against that background as although it is accepted that a person who is a citizen of a country other than Jamaica owes allegiance adherence and/or obedience to that country, section 40 (2) (a) of the Constitution should not be interpreted to refer to or include the allegiance adherence or obedience that arises from the citizenship of a Jamaican by birth who also holds the

citizenship of another country, particularly when that citizenship was obtained by an involuntary act.

He argued that the implication of the repeal of section 8 of the Constitution and its replacement with a provision prohibiting the removal of Jamaican citizenship by persons who obtained it by birth, descent or registration is that Parliament intended to protect those persons who acquired dual citizenship voluntarily.

Mr. Braham maintained that when this position is considered along with section 40(2) (a), it serves to strengthen the argument that section 40 (2) (a) does not apply to persons who hold citizenship of a foreign Power or State even if those persons sought to benefit from the privileges associated with the additional citizenship.

He said that this restricted interpretation would accord with article 25 of the United Nations International Convention on Civil and Political Rights which states that every citizen shall have the right and opportunity without unreasonable restrictions to take part in the conduct of public affairs, directly or through freely chosen representatives. Section 40(2)(a) of the Constitution should be interpreted so that a citizen of Jamaica would not be deprived of the right to participate in public affairs

directly or through freely chosen representatives unless that is expressly required by the Constitution.

Mr. Braham submitted that even if section 40 (2) (a) applies to citizens who obtained citizenship of another country by voluntary act at least for those who did not, their rights should be preserved.

Counsel also argued that the interpretation for which he contends is supported by section 41 (1) (d) of the Constitution which states:

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

As I understand the submissions of Counsel, if the words "under any acknowledgement of allegiance obedience or adherence to a foreign Power or State" are wide enough to include a citizen of that foreign power and it was the intention of Parliament to give those words a wide meaning there would have been no need to expressly refer to "citizen" in section 41(1) (d) above. Counsel contended that this reasoning is supported by the principle of construction "expressio unius exclusio alterius." (Maxwell

Interpretation of Statutes 12th Edition) He said that this principle when applied to this case means "where a statute uses two words or expressions one of which generally includes the other, the more general term is taken in a sense as excluding the less general one, otherwise there would have been little point in using the latter as well as the former."

According to the reasoning of Counsel the words "acknowledgment of allegiance, obedience or adherence to a foreign Power or State would not include a citizen, particularly a citizen who obtained citizenship involuntarily. The first respondent became a citizen by descent or derivation, not by his own act and the allegiance that he owes to the United States is not contemplated by section 40(2)(a). He said if that is so, then it does not matter whether or not that allegiance has been acknowledged in any form as the nature of the allegiance contemplated by section 40 (2) (a) is not that which flows from merely being a citizen by involuntary act.

Counsel made reference to an article by T. Alexander Aleinikoff titled "Symposium on Law and Community: Theories of Loss of citizenship" reported at 1986 84 Michigan Law Review 1471 at 1501 which states in part that:

> "... Naturalization in another country, by itself, can hardly be deemed to indicate a transfer of

> allegiance. People may seek citizenship in other countries in order to remain with family members or obtain employment. Such conduct in many (if not most) cases says little about continued allegiance to the United States. Other conduct, such as service in a foreign military or voting abroad, is equally unreliable evidence of transferred allegiance. It may be difficult to define categories of conduct evidencing loss of allegiance. Perhaps joining the army of an invading enemy or working for the violent overthrow of the state may properly be seen as indicating no further attachment to the community".

Mr. Braham also submitted that the first respondent is not disqualified as he was brought under an acknowledgment of allegiance upon his birth and not by his own act and it is immaterial even if subsequent acts by him could be interpreted as acts of acknowledgement of allegiance.

He said that where a dual citizen merely makes use of the facilities or privileges that flow from his dual citizenship that conduct will not be construed as an acknowledgment of allegiance to a foreign State or Power.

Counsel relied on two cases from the United States namely **Kawakita v United States** 343 U.S. 717 (1953) and **Jalbuena v Dulles** (1958) 254 F. 2nd 379.

Kawakita held dual citizenship. He was an American citizen and also a Japanese national who had travelled to Japan before the outbreak of the second World War and during the outbreak of the war he worked under the supervision of the Japanese army at a labour camp where he mistreated United States prisoners of war. When the war ended he returned to the United States and was arrested and charged for treason.

In his defence **Kawakita** alleged that by virtue of his conduct he had renounced or lost his United States citizenship pursuant to section 401 of the United States Nationality Act of 1940 which states:

> "A person who is a national of the United States whether by birth or naturalization shall lose his nationality by:
>
> (a) obtaining naturalization in a foreign State or
>
> (b) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign State or
>
> (c) entering or serving in the armed forces of a foreign State and unless expressly authorized by the laws of the United States if he has or acquired the nationality of such State or
>
> (d) accepting, performing the duties of any office, post or employment under the government of a foreign State or political subdivision thereof for which only nationals as such are eligible....."

Kawakita had moved to Japan where he worked. He had changed his registration from United States to Japanese, travelled on a Japanese passport and did acts to pay his respects to the Japanese Emperor. Notwithstanding his actions he was held not to have lost his citizenship.

Jalbuena also held dual citizenship of the United States and the Philippines and had travelled on his Philippino passport and declared under oath that he would bear "true faith and allegiance" to the Philippines. The Court held that his actions were insufficient to meet the standards in the citizenship disqualification clause of the 1940 Act. The Court also held that Jalbuena's actions were as a result of the routine privileges of his Philippino citizenship and he had followed the prescribed normal procedures.

Mr. Braham submitted that the first respondent's conduct in travelling on his American Passport was in accordance with the actions of **Kawakita** and **Jalbuena** which were found to be inoffensive by the American Courts. He urged the Court to find that likewise, the conduct of the first respondent was not in breach of section 40(2)(a) of the Constitution.

In my opinion the cases of **Kawakita** and **Jalbuena** are of no assistance in interpreting the relevant section of the Jamaican

Constitution as those cases were dealing with renunciation of citizenship. In both cases it was held that their actions did not amount to a renunciation of their American citizenship notwithstanding that in both cases their actions amounted to an acknowledgment of allegiance to a foreign power.

The relevance of United States Law

Rule 31.2 of the Civil Procedure Rules 2002 makes provision for evidence to be adduced on the question of foreign law.

The law of the United States of America is relevant to prove whether or not the first respondent is a citizen of the United States. There is no dispute that the United States of America is a foreign Power and he is a citizen of the United States as evidenced by his United States Passport No.710898440 which was admitted in evidence.

There is also no dispute that the first respondent obtained his United States citizenship at birth. His mother was a United States citizen as she was born in Puerto Rico. In 1959 his mother married Douglas Vaz a Jamaican, and the first respondent was born in Jamaica.

His birth was registered by his mother at the United States Embassy in Jamaica and in accordance with section 301 (a) of the Immigration and Nationality Act of the United States he became a citizen of the United

States. Mr. George Crimarco an American Attorney-at-Law called by the first respondent gave evidence of the relevant United States Law and its applicability and he was not challenged on this aspect of the case.

The relevant sections of the Immigration and Nationality Act of the United States provide as follows:

> 301(a) "The following shall be nationals and
>
> citizens of the United States at birth
>
> (1) a person born in the United States and subject to the jurisdiction thereof ...
>
> (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien and the other a citizen of the United States who prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totalling not less than ten years, at least five of which were after attaining the age of fourteen years and precedes the age of twenty eight years."
>
> 301 (b) states:
>
> "Any person who is a national and citizen of the United States at birth under paragraph (7) of sub-section (a) shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: Provided, That such physical presence follows the attainment of the

> age of fourteen years and precedes the age of twenty-eight years".

Evidence was adduced by the petitioner from Professor David Rowe an Attorney-at-Law who practises at the Florida Bar, that the residency requirement of five years was reduced to two years prior to 1978. Professor Rowe testified that if a citizen did not comply with section 301 (b) that citizen either had to apply for citizenship where he would be required to take an oath pursuant to a 1994 United States law or otherwise obtain citizenship by naturalization.

If the first respondent did not fulfill the residency requirement he would have lost his United States citizenship and would have had to re-apply for Unites States citizenship. On his re-application he would have been required to swear an oath of allegiance to the United States and this would undoubtedly have been an acknowledgment of allegiance "by virtue of his own act".

In 1978 the United States Congress passed legislation which repealed certain sections of the Immigration and Nationality Act including section 301 (b) "effective as at the date of the enactment" of the Act.

Mr. Braham contends that since the residency requirement was abolished as at October 1978 when the Act was passed, those United States citizens including the first respondent who still had time to comply

with the residency requirement did not have to do so as the requirement no longer existed as at the date of the passing of the Act. It was only those citizens who had failed to comply with the residency requirement and the time within which to do so had expired prior to the passage of the 1978 legislation who were affected.

The first respondent lived in the United States as a student from August 1978 to June 1979 and again from August 1981 to May 1983.

On the evidence adduced I am unable to conclude that it was necessary for the first respondent to fulfill the residency requirement in order to maintain his United States citizenship.

I am content to hold that there is no sufficient evidence on which to base a conclusion that the first respondent has satisfied the residency requirement, that he had any intention to do so or that such an intention was required.

The first respondent testified that he has had a total of four United States passports which were issued to him on 17th June 1978, 31st October 1984, 21st January 1994 and 5th May 2004. Only one was produced, that is, passport No. 710898440 issued in May 2004.

Counsel for petitioner sought to establish that by his application to renew his American passport the first respondent would have made an

acknowledgment of his allegiance to the United States. A United States passport form that was admitted in evidence has a section that refers to "Acts and Conditions" and an applicant must declare that he is in compliance with the acts and conditions stipulated under penalty of perjury, before his passport is renewed. The words read as follows:-

> "I have not since acquiring United States citizenship, been naturalized as a citizen of a foreign State, taken an oath or made an affirmation or other formal declaration of allegiance to a foreign State; entered or served in the armed forces of a foreign State; accepted or performed the duties of any office, post or employment under the government of a foreign State or political subdivision thereof; made a formal renunciation of nationality either in the United States, or before a diplomatic or consular officer of the United States in a foreign State; or been convicted by a Court or Court martial of competent jurisdiction of committing any act of treason against, or attempting by force to overthrow or bearing arms against, the United States or conspiring to put down or destroy by force, the Government of the United States."

Counsel for the Petitioner submits that under United States law the above words amount to an oath or declaration and they amount to an acknowledgment of allegiance owed to the United States of America by an applicant who signs the form.

Under cross examination regarding his application to renew his United States passport the first respondent could not recall whether or not

he had taken an oath but he admitted, that he signed an application form. He testified that he has never taken an oath of allegiance in order to obtain his passport. Mr. Crimarco agreed that a person who makes an application for a United States passport and signs the passport form was affirming his allegiance.

There is no evidence before the Court of a passport form signed by the first respondent that contains the acts and conditions referred to in the blank application forms that were adduced in evidence.

However, Mr. Crimarco agreed that all United States citizens owe allegiance to the United States of America and under United States law a United States citizen can renounce his citizenship. He said that only persons who owe allegiance to the United States can obtain a United States passport.

Mr. Crimarco agreed that the cases of **Kawakita** (supra), **Blumen v Haff** (1935) 78 F. 2nd 833 and **Action S.A.** and **Deltamar Establishment v Mark Rich** (1991) 951 F 2nd 504 all United States Federal cases, including United States Supreme Court cases, establish that the act of travelling on a passport is an act that is consistent with allegiance to the country that issued it.

Marc Rich (supra) was a case where Mr. Rich challenged the United States Federal Jurisdiction over him as he claimed that he had renounced his United States citizenship, but his claim failed as he was found to have performed acts of allegiance consistent with United States citizenship.

Mr. Crimarco admitted under cross-examination that when the first respondent travelled on his United States passport he was entitled to the protection of the United States. When he did so he recognized that he was a United States citizen and when he presented his United States passport to gain entry to other countries he presented himself as someone owing allegiance to the United States of America.

The first respondent admittedly travelled to several countries on his United States passport, before and after August 7, 2007 which was Nomination day. He signed a Jamaican Immigration form admitted in evidence, on which he described himself as a United States citizen. He registered as a United States citizen at an American College in Miami.

In **Joyce v Director of Public Prosecutions** 1946 A.C. 347 the appellant, an American citizen who had resided in British territory for about twenty-four years, falsely describing himself as a British subject by birth, applied for and obtained a British passport for a period of five years.

On expiration of the passport he obtained two renewals. After the outbreak of war between Great Britain and Germany and before the expiration of the validity of the passport, he was proved to have engaged in hostile acts towards Great Britain while in Germany. At the time of his arrest the passport was not found in his possession. On appeal against his conviction for treason, the House of Lords had to consider the effect of the passport and determine whether by retaining it he was under a duty of allegiance and adherence to Great Britain.

Lord Jowitt, L.C. examined the effect of obtaining the passport. He said that for a British subject it served as "a voucher and a means of identification". In relation to the appellant's possession of the passport at page 369 he said:-

> "But the possession of a British passport by one who 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 the bond which while he was within the realm bound him to his sovereign. The question is not whether he obtained British citizenship by obtaining the passport but whether by its receipt he extended his duty of allegiance beyond the moment when he left the shores of this country. As one owing allegiance to the King he sought and obtained the protection of the King for himself while abroad."

The Court found that notwithstanding that **Joyce** had obtained the passport by deception, even though he was not a British subject, by virtue of the possession of the passport he owed a duty of allegiance to Great Britain.

In **Joyce** (supra) the possession of the passport was by an alien.

However, the case is persuasive authority for the proposition that by the possession and use of a passport a citizen acknowledges his duty of allegiance.

The Jamaican Constitution clearly permits dual citizenship. The first respondent did not become a United States citizen by virtue of his own act. As a citizen of the United States of America he is entitled to obtain a United States passport.

The question arises as to whether or not the acquisition, renewal, and use of his United States passport as an adult and the benefits derived therefrom establish that he has acknowledged by his own act his allegiance to the United States of America.

It will be remembered that in his submissions, Counsel for the first respondent urged the Court that in interpreting section 40(2)(a) of the Constitution having regard to the use of the word "citizen" in section 41(d) and the recognition in the Jamaican Constitution of dual citizenship, the

Court ought to interpret section 40(2)(a) narrowly so as not to deprive the first respondent of the rights and privileges of dual citizenship and the right of a Jamaican citizen to participate in representing his constituents.

With those submissions in mind the Court will now consider similar Constitutional provisions in other Jurisdictions.

The Interpretation of Constitutional Provisions of other jurisdictions

Counsel for the petitioner contended that the respondent is under the same category of allegiance as the disqualified candidates in **Chaitan** (Supra), **Spencer v Smith,** an unreported case from the Eastern Caribbean decided on June 23, 2003, **Sykes v Cleary** (supra) and **Sue v Hill** (1999) 199 CLR 462.

Similar grounds for disqualification as stated in section 40(2)(a) of the Jamaican Constitution exist in a number of Constitutions from the Caribbean and other Commonwealth jurisdictions. In **Chaitan** (supra) the appellants were Trinidadians by birth but had voluntarily obtained citizenship of Canada by naturalization.

Section 48(1) of the Constitution of the Republic of Trinidad and Tobago states:

> "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 rationale for such a provision as Nelson J.A. stated in **Chaitan** (supra) at page 375 was that:

> "Since 1962 the law as regards entry into Parliament has always been that a Trinidad and Tobago citizen wishing to enter Parliament must have no allegiance to another country whether in terms of nationality of or allegiance to another country."

In that case the Court was urged to find that section 48(1) of the Trinidadian Constitution should be interpreted in such a way that it did not apply to dual citizenship whether obtained voluntarily or not. The Court declined to make such a finding. Nelson J.A. went on to explain (at page 377) that:

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

As to whether or not the provision was discriminatory against persons holding dual citizenship Nelson J.A. at page 378 expressed the following view:

> "It seems unrealistic to contend that section 48(1) discriminates against dual citizens. If there is discrimination it is against the foreign nationality or loyalty held by a Trinidad and Tobago citizen. The purpose of

> the provision was to prevent persons with foreign loyalties or obligations from being members of Parliament as Deane J who dissented in **Sykes v Cleary** held."

Section 44(i) of the Constitution of the Commonwealth of Australia states:

> "Any person who –
> (1) is under an acknowledgment of allegiance or adherence to a foreign power or is a subject or citizen entitled to the rights or privileges of a subject or 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."

Brennan J. in interpreting section 44(i) found that the section contains three categories of disqualification each of them being descriptive of a source of a duty of allegiance to a foreign Power. The Court therefore recognized that being a citizen of a foreign power is in itself a source of allegiance or obedience to that foreign power.

Deane J held that the words "acknowledgment to a foreign Power" are wide enough to embrace all three categories of section 44 (1). The Australian Constitution is not the same as section 40 (2) (a) of the Jamaican provision as the Australian provision disqualifies candidates whether citizenship in a foreign country was obtained voluntarily or not. However in interpreting the section the Court held that:

> "the purpose of the section was to ensure that no candidate, senator, or member of the House of Representatives owes allegiance or

> obedience to a foreign power or adheres to a foreign power."

The majority, in considering the purpose of the enactment of the disqualifying provision in **Sykes v Cleary** (supra) at 107 said that the section was designed 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."

Section 30 (1) (a) of the Constitution of Antigua and Barbuda is identical in its relevant respects to section 40 (2) (a) of the Jamaican Constitution. The Court in **Spencer v Smith** (supra) had no difficulty in concluding that the meaning of the words is clear.

The Court found that the provision properly construed does not apply to a person who obtained foreign citizenship by an act of law without any application on his part but that one who has himself taken the necessary steps to acknowledge allegiance to a foreign State is not qualified.

The respondents in the cases of **Spencer v Smith** and **Chaitan** (supra) had taken positive steps to acquire citizenship through naturalization whereas in the case at bar the first respondent's foreign citizenship was acquired by birth. The petitioner is contending that the first respondent has taken positive steps to acknowledge allegiance to a

foreign power namely the United States of America by renewing and travelling on his passport.

Michael Pryles, writing on the subject of "Nationality Qualifications for Members of Parliament," (1982) Monash University Law Review 163, 174 in relation to Section 44(i) of the Australian Constitution states:

> "The element of voluntariness can be demonstrated by the person concerned concurring in the possession of the foreign nationality. This can be shown in a number of ways."

The words "by virtue of his own act" do not appear in section 44(i) of the Australian Constitution. However, in **Sykes v Cleary** (supra) Deane J at p.127 read into the words of section 44(i) an element of acceptance or at least acquiescence on the part of the relevant person.

With regard to the acquisition of foreign citizenship, in section 44 (i). he said –

> "An Australian born citizen is not disqualified by reason of the second limb of section 44(i) unless he or she has established, asserted, accepted or acquiesced in the relevant relationship with the foreign Power."

In **Sue v Hill (1999)** 199 CLR 462 a Senator who was an Australian citizen but was also a citizen of the United Kingdom by birth had, as an adult, renewed her United Kingdom passport which was current at the

time of her election and nomination. It was held that she was disqualified on the basis that her renewal of the passport was an acknowledgment of allegiance to the United Kingdom.

With regard to Mr. Braham's contention that by birth the first respondent was already under such acknowledgment, Counsel for the Petitioner argued that even if the citizenship was automatic the possession of and use of the passport was not and the first respondent underscored his acknowledgment of allegiance by applying for and renewing his United States passport. He acknowledged his allegiance by utilizing the passport to travel to various countries, thereby seeking and benefiting from the protection afforded him by the United States of America in return for his allegiance

The evidence establishes that the first respondent is a dual citizen of the United States of America and Jamaica who acquired his United States citizenship at birth and is the holder of a valid United States passport which he himself has maintained, renewed and used for travel to various countries noted in it, before and after his nomination. On several occasions he presented himself to Immigration Authorities as being an American citizen and when he did so he understood his obligations as such.

In **Sykes v Cleary** (supra) the Court recognized that a citizen of a foreign power owes allegiance or obedience to that foreign power. On the evidence adduced the first respondent clearly owes allegiance to the United States of America as well as obedience and adherence to that country. Mr. Crimarco agreed that this is so.

The Constitution of Jamaica permits dual citizenship by virtue of section 8 which provides that no person who is a citizen of Jamaica by birth descent or registration shall be deprived of his citizenship. A Jamaican by birth descent or registration who holds the citizenship of another country cannot be deprived of his Jamaican citizenship and the first respondent is therefore entitled to the rights and privileges afforded him as a dual citizen.

The Interpretation of section 40 (2) (a) of the Constitution

However, the issue in this case is not whether or not the first respondent can be deprived of his Jamaican citizenship by virtue of his being a citizen of the United States of America but rather whether or not he is under any acknowledgment of a duty of allegiance obedience or adherence to the United States of America by virtue of his own act, which disqualifies him from sitting in the House of Representatives.

The evidence shows that the first respondent's mother applied for his first passport as a child but as an adult the first respondent took active steps to renew maintain and travel on his passport and thereby obtained the benefits of travelling as an American citizen.

If he had not renewed his passport but nevertheless retained his American citizenship in such a case there could have been no doubt that he had obtained American Citizenship involuntarily and no question of disqualification could have arisen. Had he not renewed and travelled on his United States passport it could not have been argued that he was under any acknowledgment of allegiance to the United States of America by virtue of his own act.

It is not the owing of allegiance to the United States of America by virtue of being a citizen of that country that is a ground for disqualification from sitting in the House of Representatives but rather the voluntary taking of steps to acknowledge that citizenship that causes the disqualification.

There is no prohibition of dual citizens who obtained that status involuntarily, from sitting in Parliament but if such a citizen by his own act is under any acknowledgment of obedience or adherence to a foreign power he is disqualified from so doing.

Various authors who have written articles on the analogous Australian section have stated that the policy on which the section is based seeks to avoid both actual and perceived conflict of interest from divided loyalties. An article by Gerard Carney titled "Members of Parliament Law and Ethics" (2000) 34 in part, states:

> "Foreign allegiance in its various forms, as a ground of disqualification is concerned with the avoidance of an actual or perceived split allegiance or divided loyalty....."

He continued that:-

> "... clearly, the appearance of divided loyalty on the part of a prime minister or minister with dual citizenship is most undesirable. While not as serious candidates and members should also avoid any perceived conflict of interest."

I reject as being untenable Mr. Braham's submission that since the word "citizen" appears in section 41(d) of the Jamaican constitution, section 40 (2) (a) should be given a narrow interpretation so as to include a Jamaican citizen who holds the citizenship of a foreign Power. In **Chaitan** (supra) the majority rejected a similar submission.

I hold that the words "acknowledgment of allegiance obedience and adherence to a foreign power" in section 40(2)(a) of the Jamaican

Constitution are wide enough to embrace a citizen who is a subject or citizen of a foreign power.

These words are clear. Similar provisions in Commonwealth Jurisdictions have been considered and interpreted without the need to resort to conventions or other interpretive aids. Section 40(2) also justifiably imposes disqualification from sitting in the Houses of Parliament on several citizens of Jamaica by birth. It is abundantly clear that the Constitution does not confer on every Jamaican citizen the right to be elected as a Member of the House of Representatives.

I hold further that by his positive acts of renewing and travelling on his United States passport the first respondent has by virtue of his own act acknowledged his allegiance, obedience or adherence to the United States of America and by virtue of section 40(2)(a) he was not qualified to be elected as a Member of the House of Representatives.

This Court is bound to give effect to the clear words of the section. Parliament has the option to repeal or amend section 40(2)(a) if it sees fit.

The issue of votes wasted or thrown away

The next issue that arises for determination of the Court is whether or not the votes cast for the first respondent have been wasted or thrown away.

The petitioner claims that if the first respondent is not qualified he is entitled to be returned to the House of Representatives as the duly elected Member of Parliament for the constituency as due notice of the first respondent's disqualification has been given the electors of West Portland during the election campaign.

The case of **Drinkwater v Deakin** (1874) 9 LRCP 626 has established that if an elector votes for a candidate he knows is disqualified, that elector's vote is thrown away.

This rule is established in the law of Jamaica and was considered in the case of **Stephen Mattison v John Junor** (1977) 15 J.L.R 194. In that case an Election Petition was brought by Mr. Mattison on the basis that the respondent was not qualified for election to the Parish Council. The respondent **Junor** conceded that the election was void and the main issue for determination was whether the petitioner was entitled to be declared duly elected or whether a by-election should be held to fill Mr. Junor's seat. The Court held that the majority of electors were not made aware that Mr. Junor was disqualified and declined to declare that the petitioner was duly elected.

This is what Smith C.J. said at page 198 of his judgment:

> "The decision in **Hobbs v Morey** (1) is, apparently, still the law and if followed would

> be authority for saying that the petitioner cannot claim the seat in this case unless he can show that the votes given in favour of the respondent Junor must be regarded as having been thrown away..."

The law requires that the electors know the facts creating disqualification but need not know that the facts entailed disqualification.

In **re Parliamentary Election for Bristol South East** [1964] 2 QB 257 the respondent to a Petition was disqualified for election to the House of Commons because of his inherited peerage. During the election campaign the opposing candidate gave public notice that the candidate Benn was disqualified. Benn gave a counter notice disputing it. There, the Court focused on the voters' knowledge of the facts underlying the alleged disqualification and the votes cast for him were held to have been thrown away.

The case of **Peiris v Perera** (1969) 72 New Law Reports of Ceylon 232 where a successful candidate was found guilty by an election judge of corrupt practice, makes it clear that the voters must have definite knowledge of the facts that disqualify a candidate from being eligible at the time of the election and this can be established by sufficient public notoriety of the disqualification.

The Court will assume that the voters understand the consequences of the law that votes cast for the disqualified candidate will be considered void and the next valid candidate will be considered elected. **Nedd v Simon** (1972) 19 WIR 347 repeated and applied the above principles.

Weeramantry J in the **Perera** case, (supra) stated that the rationale was the requirement that only candidates qualified in law to be Members of Parliament should offer themselves to the electorate.

At page 271 he states the relevant principles thus:

> "Essential to the proper conduct of elections is the requirement that only candidates qualified in law to be Members of Parliament should offer themselves to the electorate.
> Those who already labour under a disqualification which by law prevents them from taking their seat in Parliament go to the polls at their peril and those who vote for them with knowledge of the facts grounding such a disqualification record their votes in vain. This is a principle now ingrained in the law relating to elections and ingrained for the very good reason that the dignity and decorum which must attend the Parliamentary process are at all costs to be preserved."

In **Drinkwater** (supra) the Court made a distinction between being disqualified to be elected and being disqualified to be a candidate. In disqualification based on conduct such as bribery (as in the case of **Drinkwater**) disqualification and throwing away of votes is less likely and

in those cases based on status such as infancy or gender throwing away of votes is more likely.

As Lord Coleridge CJ at 635 in **Drinkwater** said:

> "Under the same principle may be classed cases where the disqualification was infancy.... a want of estate... and some others. The cases of a woman, of an alien under the old law, of a convicted felon stand upon the same footing. In all these cases something is wanting in the candidate himself which cannot be supplied, the existence or non-existence of which is not dependent on argument or decision but which the law insists shall exist in everyone who puts himself forward as a candidate. Bribery, however, is altogether a different matter and is subject to considerations altogether different".

Weeramanty J in **Perera** at 259 with reference to the opinion of Coleridge C.J. in **Drinkwater,** agreed that:

> "... voting for a man obviously and notoriously disqualified is a very different thing from voting for a man who proves to be disqualified after much doubt and argument upon the effect of complicated facts or legal inferences."

In **Perera** the facts in relation to the disqualification as stated at page 251 of the judgment were:

> "The report of the Judges to His Excellency and the due publication thereof were facts which at the date of the election were not mere allegations but were existing and

> established and which, as distinguished from the legal consequences following therefrom, admitted of no uncertainty."

In the case at bar the petitioner contends that all legal requirements were met by a Notice of Disqualification which was widely circulated in the Constituency of West Portland by house to house visits, at public meetings, by discussions in the media and distribution of posters throughout the constituency. In this regard evidence adduced from numerous persons by the petitioner was unchallenged and not contradicted. Further, a Fixed Date Claim form which particularized the first respondent's disqualification received widespread publication in the media. The petitioner argued that the case met both the notoriety and public notice requirements and in these circumstances the electors in West Portland will be taken to know the legal consequences of the facts on which disqualification is based. The only qualified candidate is the petitioner and the Court should find accordingly and make the declaration sought.

The first respondent argued that if the Court did not allow the citizens' votes to be counted it would fly in the face of the implicit right of each citizen of Jamaica to participate in the democratic process and to have his votes counted. He alluded to the case of **Spencer v Smith**

(supra) where the Court having found that the Senator was disqualified ordered him to vacate his seat in the Senate and ordered that a by-election be held.

Relying on the distinction between status and conduct cases as outlined in **Drinkwater** and other cases Mr. Braham submitted that in cases where the issue is that of the conduct of the candidate amounting to disqualification that conduct has to be proved or certified by a Court or tribunal.

If non-existence or existence of capacity is dependent on argument or decision then the Court will not hold the votes as thrown away unless the alleged conduct is admitted definite and certain or proved by a third party. He said that section 40(2)(a) of the Jamaican Constitution creates a conduct incapacity as the Constitutional provisions expressly require a determination of whether "by virtue of his own act" a candidate is under any acknowledgment of allegiance, obedience or adherence and that determination must necessarily involve ascertainment by a third party.

It is convenient at this point to set out the Notice of Disqualification which was by agreement admitted in evidence. It reads as follows:

"Notice of Disqualification

General Election

Date of Election: Monday 3rd September 2007 Constituency of Western Portland

"**Whereas** Drayl Vaz, a person nominated as a candidate at the General Election above-named is a citizen of a foreign Power or State namely, the United States of America and is the holder of a passport issued to him by the Government of the United States of America, the said Daryl Vaz is not by virtue of the provisions of section 40 (2) (a) of the Constitution of Jamaica qualified to be elected a Member of Parliament for the Constituency of Western Portland.

NOW TAKE NOTICE that all votes given or cast for the said Daryl Vaz at the said Election to be held on the 3 September 2007 will by reason of the said disqualification and incapacity to be elected be thrown away, and be null and void.

Dated this 29th day of August, 2007

Abraham Dabdoub
A candidate at the said election
Hart Hill
Buff Bay P.O.
Portland."

At the back of the above Notice the following appears:-

"TO: THE ELECTORS OF THE CONSTITUENCY OF WESTERN PORTLAND

Legal Opinion on the Effect of Foreign Citizenship on Candidacy in Elections to the House of Representatives

Section 40(2)(a) of the Constitution of Jamaica provides as follows:-

"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 acknowledgement of allegiance, obedience or adherence to a foreign Power or State."

The effect of this Constitutional provision is that a Jamaican citizen who wishes to become a Member of the House of Representatives must have no allegiance, obedience or adherence to a foreign country. It is not only a matter of taking foreign citizenship or swearing allegiance to a foreign Power or State which disqualifies but also it is the voluntary acknowledgement of allegiance, obedience or adherence to a foreign Power or State which disqualifies a person from being elected to the House.

This Constitutional provision was designed to ensure that Jamaican Members of Parliament did not have split allegiance and were not, as far as possible, subject to improper influence from foreign governments.

The question arises as to when the disqualification is applicable. Is it on nomination day or on election day? The answer to this question is to be found in the Trinidadian Court of Appeal case of

> William Chaitan et al v The Attorney General of Trinidad & Tobago and Farad Khan et al C v Apps. Nos. 21 and 22 of 2001. In that case their Lordships M. de la Bastide C.J., Sl. Sharma J A. and R. Nelson J.A. in their unanimous decision concluded that the critical day for identifying qualified candidates is nomination day. Disqualification at Nomination Day vitiates the electoral process which begins with nomination. The nomination of a person who is not qualified to be elected makes his nomination null and void.
>
> It is obvious from the above that any person who acknowledges allegiance, obedience or adherence to a foreign Power or State is not qualified to be elected to the House of Representatives and therefore not qualified to be nominated as a candidate at any election for the return of a member to the House of Representatives. The nomination of such person is invalid, null and void.
>
> The 29th day of August 2007
>
> Gayle A.V. Nelson
> Attorney-at-Law."

In interpreting section 40(2)(a), I base my finding of acknowledgment of allegiance, obedience or adherence on positive acts by the first respondent of applying for renewal and travelling on his American passport as an adult.

It must be noted that the Notice of Disqualification merely states that Daryl Vaz "is a citizen of a foreign Power or State...and is the holder of a passport issued to him by the Government of the United States of America." It does not state any act of acknowledgement by him. Therefore it does not satisfy the legal requirements of being clear definite and certain.

Halsbury's Laws of England Fourth Edition paragraph 835 states:

> "Votes given for a candidate who is disqualified may in certain circumstances be regarded as not given at all or thrown away and to decide this scrutiny is not necessary.
>
> The disqualification must be founded on some positive and definite fact existing and established at the time of the poll so as to lead to the fair inference of willful perverseness on the part of the electors voting for the disqualified person."

If the electors have due notice that a candidate is disqualified to be elected and with that knowledge they vote for the disqualified candidate then that would be tantamount to throwing away their votes and it is only in those circumstances that the candidate who received the minority of the votes is entitled to be declared duly elected.

Smith C.J. in the **Junor** case clearly recognized the principle that if the electors have due notice that a candidate is disqualified to be elected

and with that knowledge they nevertheless vote for that candidate then that will be tantamount to throwing their votes away and in that event the candidate who received the minority of the votes is entitled to be declared duly elected.

However at page 199 of that case he said:

> "It appears from **Hobbs v Morey (1),** and from other authorities to which reference has been made, that the over-riding principle is this: that once an election is held effect must be given to the will of the majority of the electorate and that a Court should not lightly reject the will of the majority and impose upon an electorate a person whom the majority of them did not select to represent them."

This Court is guided by the above principles.

The Role of The Director of Elections

On this aspect of the case I must also consider the role played by Mr. Danville Walker. It is not disputed that at all material times Mr. Walker was a Commissioner of the Electoral Commission of Jamaica and Director of Elections. The Commission is responsible for the Electoral system and the holding of elections and Mr. Walker as Director of Elections was responsible for the implementation of certain procedures in relation to the holding of the elections. Mr. Walker was extensively cross-examined by Counsel for the petitioner. However, there is no dispute that

after the petitioner's Notice of Disqualification was circulated Mr. Walker issued a statement on August 16, 2007 that all 146 candidates were properly nominated for the elections to be held on August 27, 2007. The Statement reads as follows:

> "Electoral Office
> 43 Duke Street, Kingston, Jamaica
> Tel: (876) 922-0425-9
> Fax (876) 967-0728
>
> August 16, 2007
>
> **PRESS STATEMENT**
>
> The Electoral Office of Jamaica wishes to advise all media houses and the public that all 146 candidates for the up-coming General Election to be held on August 27, 2007 have been properly nominated and that only a court of law can deem a candidate not qualified. We caution the media and the public not to fall prey and be misled by election or political gimmickry in this sensitive period leading up to the General Election.
>
> Signed Danville Walker
> Director of Elections."

This statement received wide publicity. Mr. Walker also issued a press release dated August 31, 2007 which is reproduced as under:

> "Electoral Office
> 43 Duke Street
> Kingston, Jamaica

Tel: (876) 922-0425-9
Fax (876) 967-0728

August 31, 2007

PRESS RELEASE

The Electoral Office of Jamaica has noticed that leading up to the election there continues to be misleading documents challenging the validity of the Nomination of candidates. The Director of Elections would like to reiterate a statement released on August 16, 2007.

All 146 candidates have been properly nominated and will be on the ballots printed for the election to be held on September 3, 2007. The public is asked to be aware that persons are apparently seeking to mislead electors that votes cast for certain candidates will be wasted. This is False. Electors are encouraged to go out and vote on election day.

The Electoral Office of Jamaica would also like to take the opportunity to remind candidates and the public of Section 97 (b) and(c) of the Representation of the People Act which states:

Every person who:

(b) before or during the election knowingly publishes a false statement of the withdrawal of a candidate at such election for the purpose of promoting or procuring the election of another candidate:

> (c) before or during any election, for the purpose of affecting the return of any candidate or prospective candidate at such election, makes or publishes any false statement of fact in relation to the personal character or conduct of such candidate or prospective candidate,
>
> shall be guilty of an illegal practice, and shall be liable on summary conviction before a Resident Magistrate to a fine not less than fifty thousand dollars nor more than two hundred thousand dollars and in default of payment to imprisonment with or without hard labour for a term not less than three years or to imprisonment with or without hard labour for a term not less than three years or to both such fine and imprisonment.
>
> Signed: Danville Walker
> Director of Elections."

The statement and press release were issued by Mr. Walker in his official capacity. He was not a representative of any of the two candidates. Further, in this case legal arguments were advanced on complicated facts and issues in order to determine whether or not the first respondent is qualified and therefore I find that the first respondent's disqualification is based on conduct, as it was in the **Drinkwater** case

I understand the law to be as stated by Weeramantry J in **Perera** (supra) at 249 that:

> " ... if there is an allegation of facts at the time of the election which become (sic) definite and certain only at a later point of time inasmuch

> as those facts have not been adjudicated upon at the date of the election, they remain, so far as the voter is concerned, mere unproved allegations. In such cases although the candidate may be declared disqualified and the election avoided, the seat cannot be awarded to the next candidate for there is not that definiteness about the facts grounding the disqualification, which would be essential if the votes are to be treated as thrown away."

In the circumstances of this case I find that having regard to the statement and press release issued by Mr. Walker in his official capacity as Director of Elections that all 146 candidates were properly nominated , there was no sufficient notice based on facts which are clear, definite and certain, to the knowledge of the voters in the constituency of West Portland so as to entitle this Court to find that their votes are thrown away. In these circumstances a by-election must be held so as to enable the electors of West Portland to choose their representative.

The Responsibility of the Returning Officer

With regard to the responsibility of the second respondent, the Returning Officer Mr. Carlton Harris the petitioner contends that he ought to have returned him as the only validity nominated candidate. Did the returning officer have any authority to do so?

Section 23 (5) of the Representation of the People Act states:

> "No nomination paper shall be valid or acted upon by the returning officer unless it is accompanied by-
>
> (a) the consent in writing of the person thereon nominated ..... and
>
> (b) a deposit of three thousand dollars in legal tender:"

The nomination papers of the first respondent were completed and presented to the Returning Officer in accordance with the Act.

In **Nedd v Simon** (supra) at 349 the Court held in circumstances similar to those in the instant case that:

> "Two persons were nominated and whether the appellant was not "duly" nominated in the sense that he was not a "valid nomination"..... was not a matter which concerned the Returning Officer".

The second respondent therefore acted quite correctly in accepting the first respondent's nomination paper and leaving the question of his disqualification to be determined by the Court.

The case of **Junor** (supra) also dealt with the role of the Returning Officer and supports the view that the Returning Officer has no authority to decide on questions of disqualification, except for cases in which there is something irregular appearing on the face of the nomination paper.

I find in agreement with Counsel Mrs. Foster-Pusey that the Returning Officer has no authority to determine whether the first respondent is qualified for nomination and the answer to the question posed in respect of the authority of the Returning Officer must be in the negative. The reliefs claimed against the second and third defendants must therefore be refused.

CONCLUSION

I find as follows:

1. The first respondent on Nomination Day, August 7, 2007, was not qualified to be elected to the House of Representatives for the constituency of West Portland.

2. His nomination on that day is invalid, null and void and of no legal effect . He was not duly returned or elected as a Member of the House of Representatives and I am obliged to certify accordingly to the Speaker of the House of Representatives.

3. The petitioner is not entitled to be returned as the duly elected Member of the House of Representatives for the constituency of West Portland and his claim for an order that he be returned as such is also refused.

4. The Petitioner's claim that the first respondent did breach sections 91 and 92 of the Representation of the People

> Act has not been pursued and the declaration sought is refused.

Having regard to the foregoing, I make no order as to costs in respect of the petitioner and the first respondent as against each other. The petitioner must bear the costs of the second and third respondents herein, to be taxed if not agreed.