

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (PCA) , A. Fernando (JA), M. Twomey (JA), F. Robinson (JA), L. Pillay (JA)

Constitutional Appeal SCA CL 07/2018
(Appeal from Constitutional Court Decision CP 6/2018

President Danny Faure	1st Appellant
The Government of Seychelles	2nd Appellant
The Attorney General	3rd Appellant

Versus

Alexia Amesbury	1st Respondent
The Constitutional Appointment Authority	2nd Respondent

Heard: 03 May 2019
Counsel: Brigitte Confait for Appellants
Frank Elizabeth for First Respondent
Anthony Derjacques for Second Respondent
Delivered: 10 May 2019

JUDGMENT

M. Twomey (JA)

Background to the Appeal

[1] In August 2018, the National Assembly of Seychelles repealed the Protection of Human Rights Act 2009 and enacted the Seychelles Human Rights Commission Act (hereinafter the SHRCA) with the stated objectives of establishing the Seychelles Human Rights

Commission (hereinafter the Commission) and to provide for its composition, powers and functions.

- [2] The First Respondent, an attorney-at-law, and at the material time also the leader of a political party, applied for the position of Chairperson of the Commission, a position advertised publicly by the Constitutional Appointments Authority. The advertisement referred to sections 5 and 6 of the SHRCA to set out the qualifications and disqualifications for the post, the latter including the ineligibility of those who were members of political parties.
- [3] The First Respondent attached to her application a letter in which she acknowledged that she was not qualified for the post given the said statutory provisions by virtue of the fact that she was the leader of a political party but asserting that the provisions were discriminatory, and violated her constitutional rights, the expressed purpose of the SHRCA, and the United Nations Paris Principles. She was not successful in her application.
- [4] Aggrieved, she filed a petition before the Constitutional Court challenging, among other things, section 6(2) (b) of the SHRCA which provided for a cooling off period of one year after a person holding office in, or an employee of, a political party had ceased to hold office before being eligible to be appointed as a Commissioner. The Court in a decision delivered on the 13 November 2018, found that section 6(2) (b) of the SHRCA was unconstitutional. It declared the provision void from the date of its judgment. It further found that section 5 and the rest of section 6 of the SHRCA were not in contravention of the Constitution.
- [5] It is from this decision that the Appellants have now appealed to this Court.

The Appellants’ grounds of appeal

- [6] The grounds of appeal filed are as follows:

1. The Constitutional Court was wrong to hold that section 6(2) (b) of the Act is unconstitutional in its entirety in that the restriction is one that is necessary in a democratic society.
2. Having found at paragraphs 59 and 66 of the judgment that a shorter period of a month, three months or six months could be implied to be justified, the Constitutional Court was wrong to hold that the restriction under section 6(2) (b) is unconstitutional.
3. Alternatively to ground (2) having found at paragraphs 59 and 66 of the judgment that a shorter period of a month, three months or six months could be implied to be justified, the Constitutional Court was wrong to hold that the restriction under section 6(2) (b) of the Act be struck out in its entirety as unconstitutional, but in accordance with Article 46(5) (e) of the Constitution it could have made an order for a shorter “cooling off” period instead of the one year.

[7] It would appear to us that the three grounds of appeal could be conflated for their consideration by this Court with the only issue being whether the Constitutional Court was wrong to hold that the impugned provision was unconstitutional in its entirety when it could have provided for a shorter cooling off period to allow the provision to be constitutional.

The impugned provisions.

[8] The provisions impugned by the Second Respondent before the Constitutional Court were Sections 5 and 6 of the SHRCA. They provide in relevant form:

5.(1) The President shall in consultation with the Speaker of the National Assembly appoint a Chairperson, a Deputy Chairperson and three Commissioners selected from a panel of 3 candidates for each post proposed by the Constitutional Appointments Authority and such appointments shall be published in the Gazette...

(3) A person is qualified for appointment as Chairperson, Deputy Chairperson or Commissioner if the Constitutional Appointments Authority is of the opinion that the

person demonstrated competence and experience and can effectively discharge the functions of the office of Chairperson, Deputy Chairperson or Commissioner...

(12) The Chairperson, Deputy Chairperson and the Commissioners shall not enter upon the duties of their offices unless they have taken and subscribed before the President the Oath of Allegiance and the Judicial Oath...

6.(1) A person having the qualifications specified under section 5 is eligible to be appointed as the Chairperson, Deputy Chairperson or a Commissioner, as the case may be, if that person—

(a) is a citizen of, and resides permanently in, the Republic;

(b) is of proven integrity; and

(c) is not an undischarged insolvent or bankrupt.

(2) A person shall not be appointed as the Chairperson, Deputy Chairperson or a Commissioner if that person—

(a) holds office in, or is an employee of, a political party;

(b) has ceased, to hold office in, or to be an employee of, a political for a period of less than one year;

(c) is a member of the National Assembly or District Council;

(d) has been convicted and served a sentence of imprisonment for a term of six months or more for an offence involving fraud, dishonesty or moral turpitude, or any other offence under any other written law; or

(e) has been adjudged as a violator of human rights by a competent Court or authority. (Emphasis added)

The submissions of the Appellants

- [9] The Appellants (relying on *Aimée v Simeon* (2000-2001) SCAR 103) have submitted that the restriction as concerns the eligibility of candidates to the Commission contained in section 6 (2)(b) of the SHRCA in furtherance to the restriction in section 6 (2)(a) of the Act was necessary “in a democratic society” since the object of the two provisions were the preservation of the independence of the Commission. Hence, they added, the resulting classification created by the provisions was a reasonable differentiation for a legitimate purpose and in no way breached Article 27 of the Constitution which provided for the right to equal protection of the law without discrimination.
- [10] They further submitted that the classification was neither arbitrary nor irrational. They stated that the differentiation equated with comparable cases in other jurisdictions where the courts have found that a reasonable classification for the purpose of legislation is permissible if it is founded on rational intelligible differentia in relation to the object sought to be achieved by the statute in question (see for example *Budhanm Chaudry v The State of Bihar* (1955) AIR 191).
- [11] Further, they submitted that in any case the general rule was that senior civil servants should remain neutral and apolitical to avoid a perception of bias or conflict of interest (*Senior Non-Expatriate Officers’ Association & Ors v Secretary for the Civil Service* (1996) 7 HKPLR 91).
- [12] With regard to their ground of appeal on the issue of the Constitutional Court’s finding that there was no justification for the one year cooling off period between resigning from a political party and applying for the post of Commissioner they submitted that it could therefore be implied that a lesser period would be justified and that therefore the restriction could not be unconstitutional.
- [13] In correlation to this last submission they stated that in the circumstances, the Constitutional Court could have exercised its power under Article 46(5) of the

Constitution to impose a lesser period than one year and not strike out the whole of section 6 (2) (b) of the Act.

The submissions of the Respondents

- [14] The two Respondents have filed similar submissions. They simply reiterated their submissions in the Constitutional Court. They relied on the Paris Principles which promotes a pluralistic approach in the selection of persons for appointments in national institutions on human rights. They also rely on *Sullivan v Attorney General and Anor* (2014) SLR 417 (hereafter Sullivan) which laid down the test to be adopted by Courts in assessing the constitutionality of a limitation of Article 22 of the Constitution and applied to Article 23 in *Seychelles National Party & Anor v Government of Seychelles & Ors* [2015] SCCC 2. The *Sullivan* test is threefold: 1. whether the impugned provision as framed was formulated with sufficient precision to satisfy the “prescribed law” criterion., 2. whether the exception was necessary in a democratic society and 3. whether there was proportionality between the provision in terms of the restrictions it imposed on a fundamental right of the Charter and the objective of the legislation identified.
- [15] The Respondents also directed the Court’s attention to Article 47 of the Constitution which provides for the rules of interpretation when rights and freedoms are limited by laws. As a whole their submission was that the differentiation was neither intelligible, nor rational and not necessary. It was arbitrary as to be nonsensical and it was the only law in Seychelles containing such a restriction despite other legislation making provision for similarly sensitive posts. It was also their submission that constitutional oaths would purge one of bias perceived or otherwise in any case.

Discussion

- [16] The aims of the SHRCA does not contain an explanation as to the cooling off period for politicians applying for posts on the Commission. Hansard was not available to this Court but at the hearing of this appeal, we called for evidence from two members of the Bills Committee as to the purpose of the cooling off period. The evidence adduced was to the effect that it was the aim of the Act to have apolitical members of the Commission. It was

emphasised that Seychelles was much polarised politically and that it was hoped that the cooling off period would permit a public perception that the members of the Commissions were neutral, impartial and independent.

- [17] The questions that remain to be determined is whether these lofty ideals as transmitted in section 6 (2) (b) of the Act achieve this aim and whether they are constitutional. We support the approach of the Constitutional Court which proceeded from the assumption that the test for the constitutionality under Article 27 should be similar to that under Article 22 (where the *Sullivan* proportionality test applies). While the wording of Article 27(2) differs from that of Article 22(2) and is not subject to the same internal limitation provisions as Article 22(2) any limitation of it must also be justified on the basis of necessity in a democratic society and read with Article 47.
- [18] In that regard, we are of the view that the Constitutional Court was correct in its assessment that the First Respondent's right to equal protection of the law including the enjoyment of rights and freedoms, specifically in participating in government without discrimination, was not absolute, and that the state could make laws restricting these rights if those limitations were *necessary in a democratic society*.
- [19] The restrictions relating to the ineligibility of active politicians generally to become members of the Commission was shown to be objectively serving a legitimate purpose, namely to safeguard the independence of the Commission. The primary duties of the Commission is to ensure that citizens' rights and freedoms are protected and in this respect the impartiality and independence of the members of the Commission is crucial.
- [20] However, we have difficulty with the imposition of a cooling off period on persons who have held office in or been an employee of a political party. This distinction has not been explained. The Appellants inference that a shorter cooling off period would render the provision constitutionally compliant, misses the point regarding arguments against cooling off provisions, irrespective of the time period.
- [21] The cooling off period, therefore on its own is problematic. We may assume that cooling off periods in the circumstances of the impugned provisions would have the objectives of

both eliminating perceived bias but also of preventing conflicts of interest (real or perceived) that might arise from the possibility of politicians making decisions to benefit their party after they have left office. This was not cogently argued at the court below or before us. While the authorities cited by the Appellants, mainly cherry-picked from other jurisdictions, explain the necessity of rational intelligible differentia in limitations to rights, they do not explain the arbitrariness of the one year period imposed. Why we may ask, as did the Constitutional Court, that a year as opposed to three months or six months would purge one's political affiliations. Can a specific period of time be assigned to the elimination of one's political attachments and beliefs?

[22] Articles 27 and 47 require that a legislative provision which discriminates between persons must be related by necessity to the accomplishment of some legitimate purpose. And the Appellant has failed, during either hearing to provide a clear rational basis for this one year period, or its necessity of being applied to this group of persons. Objectively viewed, therefore, the imposition of an arbitrary period cannot be rational.

[23] As early as 1897 the Supreme Court of the United States of America found that:

“[The] mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment,..it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground-some difference which bears a just and proper relation to the attempted classification-and is not a mere arbitrary selection” (Gulf Colorado & Santa Fe Railway v. Ellis 165 U.S. 150 (1897), 165-66).

[24] Equally in *FS. Royster Guano Co. v. Virginia* 253 U.S. 412 (1920), 415, the Supreme Court found that a classification

“must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation ..”

[25] In our jurisdiction in respect of Article 27, *Mancienne v The Attorney General* (1996-1997) SCAR 163 and *Aimée* (supra) laid down the same principles, that is, that classification must be founded on intelligible differentia which distinguishes between

those in the group and those left out of the group, and that the differential must have a rational relation to the object sought to be achieved.

- [26] We are aware that courts ought to be cautious when conducting rationality tests on classifications created by legislation. Judicial intervention into legislative policy-making is not a task for which the courts are suited and would any case result in a breach of the separation of powers doctrine entrenched in our Constitution. In this optic, the application of either the *Sullivan* test for constitutionality (supra) or the Canadian *minimal impairment test* (see *R v Oakes* [1986] 1 SCR 103) that is, checking that the limit imposed on the freedom does not impair the right or freedom no more than is reasonably necessary to accomplish the objective, demonstrate that the one year limitation period or any limitation period although of sufficient importance to warrant overriding the constitutionally protected right or freedom in this case would not rationally be connected to the objective of the Act and would be arbitrary, unfair and clearly based on irrational considerations.
- [27] We raised the point during the hearing of similar legislation providing for the appointment of persons to politically sensitive posts, such as the Constitutional Appointments Authority itself, the Office of the Ombudsman or the Judiciary and the obvious irrational distinctions with the impugned provisions of the SHRCA. In fact it was the submission of the Appellants that senior civil servants or like persons should remain neutral and apolitical to avoid a perception of bias or conflict of interest. While we feel that the prohibitions set out in section 6 of the SHRCA would meet the objectives of the Act and proof persons appointed against perceived bias we are not of the view that the provisions of section 6(2) (b) of the Act pass the constitutionality test given its arbitrariness.
- [28] In the circumstances this appeal is dismissed in its entirety. We confirm the finding of the Constitutional Court that section 6(2) (b) of the Seychelles Human Rights Act imposed an unjustifiable limitation on the right to equal protection of the law under Article 27 and is therefore invalid.

[29] Notice of this decision is to be served on the President and the Speaker of the National Assembly.

M. Twomey (JA)

I concur:.

F. MacGregor (PCA)

I concur:.

A. Fernando (JA)

I concur:.

L. Pillay (JA)

Signed, dated and delivered at Ile du Port on 10 May 2019