

**CONSTITUTIONAL COURT OF SEYCHELLES**

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**Reportable**

[2018] SCCC 16

CP 06 /2018

In the matter between:

**ALEXIA AMESBURY**

*(rep. by Frank Elizabeth)*

**Petitioner**

and

**PRESIDENT DANNY FAURE**

**GOVERNMENT OF SEYCHELLES**

**ATTORNEY GENERAL**

*(rep. by Brigitte Confait, Senior State Counsel  
for the Attorney General)*

**1<sup>st</sup> Respondent**

**3<sup>rd</sup> Respondent**

**4<sup>th</sup> Respondent**

**CONSTITUTIONAL APPOINTMENTS**

**AUTHORITY**

*(rep. by Anthony Derjacques)*

**2<sup>nd</sup> Respondent**

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**Neutral Citation:** *Amesbury v Faure & Ors* (CP 06/2018) [2018] SCCC 16 (13 October 2018).

**Before:** Burhan, Govinden, Vidot JJ

**Summary:** Constitutional appointment – restriction on applicant being politician – equality – freedom of association – freedom of expression - discrimination

**Heard:** 30 October 2018

**Delivered:** 13 November 2018

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**ORDER**

Sections 5 and section 6 excluding section 6(2)(b) of the Seychelles Human Rights Commission Act are not unconstitutional.

Section 6(2)(b) of the Seychelles Human Rights Commission Act imposes an unjustifiable limitation on the right to equal protection of the law under Article 27 and therefore invalid.

Petition partially successful, parties to bear their own costs. Notice to be served on the President and the Speaker of the National Assembly.

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## JUDGMENT

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### JUDGMENT OF THE COURT

- [1] This is an application under article 46 (1) of the Constitution of the Republic of Seychelles and concerns the Constitutional validity of sections 5 and 6 of the Seychelles Human Rights Commission Act, Act 7 of 2018 (hereinafter referred to as the SHRCA or the Act) which disqualifies politically affiliated persons from consideration for appointment to the Seychelles Human Rights Commission (SHRC or the Commission).
- [2] The petitioner is an attorney-at-law and the leader of a political party. She brings this case against the President of the Republic of Seychelles who makes appointments for the Commission under the Act after receiving names from the second respondent, the Constitutional Appointments Authority (CAA), which is a constitutional body established to *inter alia* make recommendations for the appointment of persons to certain prominent positions for the Republic. The third respondent is the Government of Seychelles. The fourth respondent the Attorney General, joined in terms of Rule 3(3) of the *Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules*
- [3] The dispute giving rise to the present litigation arose when the CAA advertised vacancies and called for applications to fill the positions of Chairperson, Deputy Chairperson and three Commissioners to the Human Rights Commission. The public advertisement annexed to the petition as (AGA1) refers to the powers and functions of the SHRC contained in section 14 of the Act and also further refers to section 5 and 6 of the Act setting out the qualifications and disqualifications as contained in the said sections for the said posts. The advertisement requested the submission of a Curriculum Vitae (CV) and two references on or before the 17<sup>th</sup> of September 2018.
- [4] The petitioner, Mrs Alexia Amesbury, filed her application for the position of Chairperson on the 16<sup>th</sup> of September 2018. Her application acknowledged that she was

not qualified for consideration due to her status as the leader of a political party. She however asserted, in her cover letter, that the provision disqualifying her was discriminatory against her, constituted a violation of several of her constitutional rights, and went against both the statutorily expressed purpose of the Human Rights Commission and the provisions of the Paris Principles' guidelines for the constitution of national institutions. She attached a brief excerpt from this latter document to her application, in addition to her other resume documents.

- [5] On the 20<sup>th</sup> of September 2018, a letter was addressed to the petitioner by the Chairman of the CAA, Mr. Michel Felix. The letter confirmed that for reasons stated therein the petitioner was not eligible to be considered for appointment to the Commission. Mr. Felix noted the substantive objections raised by the applicant to the constitutionality of the provisions of the Act, but expressed that the Commission does not have *“the power to initiate proceedings relating to the constitutionality of a law or even, for that matter, to seek the leave of the Court to become a party to proceedings relating to proceedings of constitutionality or otherwise of a law”*. The CAA thus proceeded under the presumption that the impugned law was constitutional.
- [6] The petition was launched on the 25<sup>th</sup> of September 2018. The petitioner in the prayer of her petition other than her injunctive prayers, seeks the following relief:
- a) An order declaring *“that sections 5 and 6 of the Human Rights Commission Act are unconstitutional as it discriminates against the petitioner and violates her right under article 27 of the Constitution”*.
  - b) A declaration *“that sections 5 and 6 of the Human Rights Commission Act are inconsistent with article 5 of the Constitution and cannot be condoned as being necessary in a democratic society and should be declared null and void”*.
  - c) A declaration *“that an Act whose object is to investigate and conciliate[e] complaints of discrimination, and make recommendations to address discrimination cannot itself be discriminatory in the selection of those who qualify to be appointed under the Act”*.

*to serve on the Human Rights Commission, is unconstitutional, null and void as it defeats its object”.*

- [7] The petitioner also prayed that her application be dealt with as a matter of extreme urgency, and sought injunctive relief against the President of the Republic of Seychelles (First Respondent) and the Constitutional Appointment Authority (Second Respondent), to ensure that the CAA did not make a recommendation to the President and the President did not make an appointment before the resolution of these proceedings. At a hearing on the 9<sup>th</sup> of October 2018, the injunctive relief sought was withdrawn with the consent of all parties that this matter would be dealt with expeditiously.

### **Impugned provisions**

- [8] It is pertinent at this stage to set down in verbatim the impugned statutory provisions, sections 5 and 6 of the SHRCA which read as follows:

#### ***Appointment of Chairperson, Deputy Chairperson and Commissioners***

- 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.*
- (2) *The Constitutional Appointments Authority shall before making recommendation under section (1), advertise the posts of Chairperson, Deputy Chairperson and Commissioners specifying the qualification for such posts.*
- (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.*
- (4) *The Chairperson, Deputy Chairperson and the Commissioners shall hold office for a term of 5 years, and shall be eligible for reappointment.*
- (5) *Whenever the Chairperson is absent or for any reason unable to, exercise the powers and perform the functions vested in the office of the Chairperson, or whenever the office of Chairperson is vacant, the Deputy Chairperson shall exercise all the powers and shall perform all the functions of the Chairperson.*

- (6) *Whenever both the Chairperson and the Deputy Chairperson are absent or for any reason unable to exercise the powers and perform the functions vested in the office of Chairperson, or whenever both offices are vacant, the remaining Commissioners shall from themselves elect an acting Chairperson.*
- (7) *Any Commissioner acting as Chairperson of the Commission by virtue of the provisions of subsection (8) may, while so acting, exercise all the powers and shall, while so acting, perform all the functions of the Chairperson.*
- (8) *Where a vacancy occurs in the office of the Chairperson by reason of death, resignation, or for any other reason stipulated in section 7, the President may authorise the Deputy Chairperson or in his or her absence or vacancy in the office of the Deputy Chairperson, a Commissioner to act as Chairperson until the vacancy is filled in accordance with this Act.*
- (9) *Where a vacancy occurs in the office of the Deputy Chairperson by reason of death, resignation or for any other reason stipulated in section 7, the President may authorise a Commissioner to act as the Deputy Chairperson.*
- (10) *A person authorised under subsection (10) or (11) may hold the office for the unexpired term of the vacancy to which that person is authorised or till a person is appointed to the vacancy, whichever earlier, as the case may be.*
- (11) *Subsection (12) shall mutatis mutandis apply to a vacancy caused in the office of a Commissioner also.*
- (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.*

***Eligibility of Chairperson, Deputy Chairperson and Commissioners of Commission***

- 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.*

[9] The petitioner's challenge is drafted in broad terms and seeks to have sections 5 and 6 of the Act declared unconstitutional in their entirety, however it is clear that the substance of her case, and indeed her standing to initiate suit, only goes to section 6(2) of the Act; in particular, subsections (a) and (b). In our opinion, her challenge once argued was not to the whole of sections 5 and 6 but only to these specific provisions because they exclude her from consideration, on the basis of her political office.

#### **The Petitioner's case**

[10] The petitioner alleges that her exclusion from eligibility to be a Commissioner on the grounds of her political affiliation violates at least two of her constitutional rights. The first is her Article 27 right to equal protection of the law which reads as follows;

- (1) *Every person has a right to equal protection of the law, including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground except as necessary in a democratic society.*
- (2) *Clause (1) shall not preclude any law, programme or activity which has as its object, the amelioration of the conditions of disadvantaged persons or groups.*

[11] Learned Counsel for the petitioner further alleges an infringement of the petitioner's rights under article 23 of the Constitution, the right of assembly and association, that reads as follows:

- (1) *Every person has a right to freedom of peaceful assembly and association and for the purpose of this article this right includes the right to assemble freely and associate with other persons and in particular to form or to belong to political parties, trade unions or other associations for the protection of the interests of that person and not to be compelled to belong to any association.*

*(2) The right under clause (1) maybe subject to such restrictions as may be prescribed by law and necessary in a democratic society:-*

*(a) in the interests of defence, public safety, public order, public morality or public health:*

*(b) in respect of the registration of associations or political parties*

*(c) for the protection of the rights and freedoms of other persons,*

*(d) for the imposition of restrictions –*

*(i) on persons who are not citizen of Seychelles*

*(ii) on public officers or members of the disciplinary forces.*

[12] The petitioner’s case is that sections 6(1) and (2) discriminate against her on the basis of her political affiliation and infringe her rights under article 23 of the Charter to have freedom to associate, form or belong to a political party.

[13] It is the contention of the petitioner that sections 5 and 6 of the SHRCA unconstitutionally discriminate against her and therefore should be declared void in terms of article 5 of the Constitution which states that “the Constitution is the supreme law and any other law found to be inconsistent with the Constitution is, to the extent of the inconsistency null and void.”

[14] The case for the petitioner as per the submissions of Learned Counsel for petitioner Mr. Elizabeth, is that the petitioner, according to her CV filed (Annexure AGA7) is the leader of a political party, namely, “The Seychelles Party for Social Justice & Democracy” whose main objective according to the CV filed, is to enforce and respect the Seychellois Charter of Fundamental Rights in the Constitution. It is his contention that it was this portfolio held by her that disqualified her application from being considered for the said post according to the letter sent by the CAA basing its rejection on the contents of section 5 and 6 of the SHRCA. It is his contention that section 6 (2) (a) of the SHRCA is so stringent that it totally eliminates the petitioner from being considered and therefore is discriminatory in nature.

- [15] Learned Counsel Mr. Elizabeth further contends that the petitioner under article 22 has a right to participate in government and take part in the conduct of public affairs and article 23 of the constitution guarantees the right of assembly and association to every citizen to form or to belong to political parties. His contention is that the rights given by these articles to the petitioner have been taken away by section 6 (2) (a) and 6 (2) (b) of the SHRCA.
- [16] Learned Counsel for the petitioner referred to article 1 of the Convention of the International Labour Organisation (ILO) which defines discrimination as being any distinction, exclusion or preference made on the basis of race, colour sex, religion, political opinion. At the instance of the Court he also referred to section 6 (2)(b) which sets out that that even if a person resigns, the person would have to wait 12 months before becoming eligible for the said post. It is his contention therefore that section 6 (2)(a) and (b) on this basis violates article 27 of the Constitution.
- [17] Learned Counsel for the petitioner contends that the decision of the 2<sup>nd</sup> respondent by refusing to consider the application merely on the basis that the petitioner belonged to a political party was unconstitutional and contravened article 27 (1) of the Constitution. He further stated that Learned Counsel for the first, third and fourth Respondents had raised a ground that as the petitioner belonged to a political party there was a possibility of the petitioner discriminating against another because of her affiliation to a political party. He stated that the fact there were three commissioners sitting together assured that there would be no discrimination. He further stated that when the names were recommended to the President of the Republic who represented a plural modern democratic society, had the prerogative to decide not to select the petitioner on grounds of her political affiliation. He further submitted that 40% of the population was affiliated to political parties and therefore 40% of the population would be not eligible for appointment to the SHRC due to their political affiliation. He further stated that the Constitution states that the CAA should be made up of different political parties whereas another body the Human Rights Commission discriminates on the basis of political affiliation. Learned counsel for the petitioner also referred to paragraph 8 of the Paris Principles which excludes Government from certain bodies but not politicians. Learned Counsel also referred to the fact that the



law not only specifies that one who holds office in a political party should resign but also states the person should have ceased holding office for a period of not less than one year.

*Second respondent's submissions*

[18] Mr. Derjacques on behalf of the 2<sup>nd</sup> respondent submitted that in terms of article 5 that Court could use its discretion and if Court finds that not all but some part of the impugned sections in the SHRCA are not constitutional, it could use the doctrine of severability and simply strike off the offending wording of sections 6 (2) (a) or (b) as null and void. He referred to the petitioner's rights under article 22 and 23 of the Constitution and moved the Court to consider international instruments such as page 2 of the Paris Principles. He also referred to section 1 of the ILO Convention and article 2 which imposes on all states to promote equal opportunity and treatment. He conceded the law was certain and precise. He referred to the case ***Dow v Attorney General (2001) AHRLR 99 (BwCA 1992)*** which held at paragraph 7 that the limitations on the rights and freedoms must not prejudice the rights and freedoms of others or public interest. He also referred to the case of ***Matadeen v M.G.C Pointu and Ors (Mauritius) (1998) UKPC 9 Privy Council Appeal No 14 of 1997*** which at paragraphs 7, 9 and 16 refers to the fact that equality before the law requires that persons be uniformly treated unless there is some valid reason for them to be treated differently. He referred to Article 2 (1) of the Covenant on Civil and Political rights which states that no distinction should be drawn on grounds of race, colour, language, religion, political or other opinion. Discrimination if any should be based on reasonable and objective criteria. He also referred to the case of ***Nancy Law v Canada Minister of Employment and Immigration (1999) 1 S.C.R. 497 (Canada)*** which refers to the comparative approach and the context method and drew the attention of court to paragraphs 77 and 78 of the said judgment. He however, conceded that even if one had to resign to take the post, the cooling off time period of one year set out in 6(2) (b) was unnecessary and onerous.

[19] Referring to the case of ***Karma Dorjee & Ors v U.O.I. & Ors (India) Writ Petition 111 of 2014*** which is in line with Article 27(2) of our Constitution, Learned Counsel submitted that where in a class of disadvantaged persons, one could have laws to their advantage to ensure equality and thereby ameliorate their rights which is referred to as

positive discrimination. He also on similar lines referred to the **African Human Rights Law Journal** and distinguished between formal equality as set out in the Rule of law where everyone is equal before the law and substantive equality which is more on the lines of article 27 (2) of our constitution.

*Submissions of the first, third and fourth respondents*

- [20] The first, third and fourth respondent, represented by Senior State Counsel Ms. Confait for the Attorney General, submitted on two points. First, that the petition failed to disclose a cause and that the pleadings are frivolous and vexations, and secondly, that the provisions of the act constitute reasonable classification under the right to equal protection of the law.
- [21] Relying on ***Aimee v Simeon & Ors SCA 7/2000*** Ms. Confait submitted that the classification in section 6 between persons who are politicians and those who are not is constitutionally permissible. She submitted that what is required by the constitution is that alike persons are treated alike (***Simeon v Republic CP 4/1999***) and that the classification is “not arbitrary, artificial or illusory” (***Pathumma v State of Kerala 1978 SC 771*** as quoted in ***Aimee v Simeon*** ).
- [22] Ms. Confait pointed out that the petitioner fell into one of several classes of persons excluded by section 6 from eligibility for the position on the Human Rights Commission, including members of the National Assembly, or of a District Council, or persons holding office in a political party or employed by a political party.
- [23] Ms. Confait submitted that the right to freely associate (which includes the right to form or belong to a political party) contained in Article 23 could be subject to limitations which may include restrictions on public officers. She submitted therefore that section 6(2)(a) of the Act was consistent with Article 23(2)(d)(ii).
- [24] With regard to equality, Ms. Confait relied on ***Aimee v Simeon*** in which the court held that “a limitation recognised in such society [a democratic one] is the power of the State to classify persons for legitimate purposes and for differential treatment. This doctrine of classification is based on reasonableness.”

- [25] The rationale for the exclusion of persons holding political office was explained as being a mechanism to protect the Commission from interference, in line with section 3(2) of the Act which provides that “the Commission shall be a self-governing, neutral and independent body and shall not be subject to the direction or control of any person or authority.” She submitted further that the independence of the Commission is “paramount in view of its powers and functions... [and] in order to ensure that there is no political interference or bias in the exercise of the powers and functions of the Commission.” Given the objectives of the Commission, it was submitted that the differentiation is reasonable, necessary and justified in a democratic society.
- [26] It was pointed out that the promotion of Human Rights is only one of the petitioner’s political goals. Ms.Confait submitted that there are similar restrictions on political affiliation in constitutional bodies, including the Electoral Commission, Ombudsman and the members of the Public Service Appeal Board.

### **The law**

- [27] While thanking all Learned Counsel for their efforts in this case and for the extensive number of local and foreign sources canvassed before the Court, we are of the view at the very outset that considering the background facts peculiar to this case, that positive discrimination and the principles of substantive formality are not applicable given the facts of this.
- [28] We begin with the textual approach that the Court must take to the interpretation of the rights contained in the Charter of rights in our Constitution.
- [29] It should be borne in mind that article 45 of our Constitution, instructs that all interpretations in regard to the Charter on Human rights in the Constitution, should ensure that there is no suppression of the rights of freedoms contained in the Charter.
- [30] Furthermore, where there is a limitation of a Charter right, article 47 imposes a requirement of ‘strict necessity’ in assessing the breadth of the limitation and a relationship between the purposes for which the limitation is imposed and the mechanisms adopted. Article 47 states that:

*Where a right or freedom contained in this Charter is subject to any limitation, restriction or qualification, that limitation, restriction or qualification -*

*(a) shall have no wider effect than is strictly necessary in the circumstances; and*

*(b) shall not be applied for any purpose other than that for which it has been prescribed.*

[31] The Court must be guided both by national and international norms, since article 48 of our Constitution directs us to take the following matters in consideration when interpreting the provisions relating to the Charter:

*(a) the international instrument containing these obligations;*

*(b) the reports and expression of views of bodies administering or enforcing these instruments;*

*(c) the reports, decisions or opinions of international and regional institutions administering or enforcing Conventions on human rights and freedoms;*

*(d) the Constitutions of other democratic States or nations and decisions of the courts of the States or nations in respect of their Constitutions.”*

[32] With these elements in mind we will now proceed to analyse the facts before us.

[33] It is accepted that the impugned provisions create a distinction between classes of persons who are eligible to apply for positions on the SHRC and those who are not. The question is whether the differentiations under section 6(2)(a) and (b) are permissible under article 27 of the Constitution?

[34] Secondly, it is accepted that the effect of the impugned provisions is to restrict the petitioner’s ability, as a potential Commissioner to actively associate with a political party, and the question that is raised in this regard is whether this limitation created by both impugned provisions on the petitioner’s article 23 right is justified under the Constitution?

[35] This right relied on by the petitioner is not absolute and the State may enact laws restricting these rights if these restrictions are necessary in a democratic society. Article 49 of the Constitution defines “democratic society” as :

*“a pluralistic society in which there is tolerance, proper regard for the fundamental human rights and freedoms and the rule of law and where there is a balance of power among the Executive, Legislature and Judiciary.”*

***Equality in Seychellois law - whether the differentiation in section 6(2) is permissible under article 27 of the Constitution?***

- [36] We are aware that equality before the law is found in most written Constitutions and has its historical origins English law. Seventeenth century jurist, AV Dicey stated that “in England no man is above the law but everyman, whatever his rank or condition may be, is subject to the ordinary law of the land” (***Law of the Constitution*** (10<sup>th</sup>edn Macmillan London 1959).
- [37] The statement “equal protection of the law” first occurred in the fourteenth Amendment of the American Constitution which became law in 1868. Equal protection of the law does not mean that all persons are to be treated alike in all circumstances. It was interpreted to mean that persons who are similar circumstanced must be similarly treated. The State however is permitted to make laws that are unequal when dealing with persons who are placed in different circumstances and situations. Thus the State has a right to classify persons and place those who are substantially similar under the same rule of law while applying different rules to persons differently situated.
- [38] In ***Aimee v Simeon & Ors SCA 7/2000*** the Court held that “the principle of equality does not take away from the State the power of classifying persons for legitimate purposes. A reasonable differentiation between the two categories which is fairly related to the object of the legislation does not violate Article 27(1) and is constitutionally permissible.”
- [39] The Court therefore adopted the international equality law approach that there is a difference between constitutional differentiation and discrimination. “Discrimination”, according to the Oxford Dictionary means to make an adverse distinction with regard to; to distinguish unfavourably from others. It involves an element of unfavourable bias. For example, in Indian constitutional law, if such bias is based on race, religion,

language ,caste, sex, political opinion, the constitutional prohibition in article 12(2) of the Indian Constitution is violated Sastri CJ in ***Kathi Raning Rawat v Saurashtra*** AIR 1952 SC 123. In American jurisprudence, the courts held that a classification should not be irrational or arbitrary. It must be reasonable and based on some real and substantial distinction as held by Brewer J in ***Gulf Colorado and Santa Fe Railway Co v Ellis*** 165 US 150,155 (1897).

[40] In ***Aimee v Simeon***, The Court held further (borrowing the wording from ***Budham Chaudry v the State of Bihar*** AIR (1995) SC 191) that

*Classification is permissible on two conditions:*

(3) *The classification must be founded on an intelligible differentia which distinguished persons or things that are grouped together, from other left out of the group.*

(4) *The differentia must have a rational relation to the object sought to be achieved by the Statute in question. What is necessary is that there must be a nexus between the basis of the classification and the objects of the Act.*

[41] In Seychelles, the cases of ***Gervais Aimee*** SCA 07/2000, ***Phillip Simeon v The Republic CP4 of 1999***, ***Roger Mancienne v The Attorney General*** SCA 15 of 1996, ***Paul Chow v Attorney General*** [2007] SCCA 2 also dealt with the right to equal protection in a similar manner. Twomey JA in the case of ***Alcide Boucherau & Ors v Superintendent of Prisons & Ors*** SCA 01/2013 held

*“In this regard we endorse the findings of the Constitutional Court that the right to equal protection translates into the State treating an individual in the same manner as others in similar conditions and circumstances. A distinction or classification is constitutional if it has a rational basis or legitimate State objective ..... where the discrimination or classification has a rational basis or where the State has a rational interest in making the distinction then the qualification will pass the Courts’ scrutiny”.*

[42] It is the contention the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents, the legitimate government purpose being sought to be achieved by sections 6(2)(a) and 6(2)(b) of the Act in this instant case is to safeguard the independence of the Commission. Therefore, the classification that is being made in section 6(2)(a) is based on intelligible differentia, namely, persons who

have current interests which would affect their independence and impartiality are excluded from eligibility to stand as Commissioners. We have no difficulty in accepting the rationality of the differentiation and its relationship here to a legitimate State objective.

[43] It is apparent that one of the prime duties of the Commission under the Seychelles Human Rights Commission Act, is to ensure that the rights and freedoms of all citizens are protected and is also empowered in the event of a breach, to investigate such breaches. In order to do so the SHRC specifically refers to the Independence and the Impartiality of the Chairperson and the Commission in section 9 of the said Act. Therefore it is the view of this Court that if persons are to be independent and impartial and to perform their duties accordingly, they cannot wear two hats at the same time, that of a leader of a political party and Chairperson of the Human rights as borne out in the facts of this instant case.

[44] In our view it is the duty of the SHRC to take on the grievances of the people and the SHRC is the voice of the civil society which democratises the State. Therefore government officials as per paragraph 8 of the Paris Conventions are precluded from any decision making process. It is apparent that the need to exclude persons with strong political portfolios because of the probability that such persons would have their own agendas within their manifestos to promote and defend and therefore their impartiality and independence would be questioned. Such portfolios would dilute the perception of independence of the SHRCA. When such a general classification is in place, it would not be possible to accommodate an individual person from the group however qualified or suitable to the post the person might be.

[45] In any event to hold a political portfolio and that of the Chairperson of a Human Rights Commissioner in our view is dangerous as in the event of a breach of human rights being alleged against a member of her own political party or even against the Government made up from an opposing political party, the perception of independence and impartiality of a political appointee to the said post would seriously be in question especially if the person still retains their political portfolio. We take notice of the fact that

the political party of which the petitioner is the leader is part of the coalition of parties forming the majority in the National Assembly. However, the law provides that such person could be considered if such person ceases to hold such political office and therefore it cannot be stated that the law is draconian in nature or unfair.

[46] In accordance and in conformity with article 48 of our Constitution, we have researched the laws similar to the Seychelles Human Rights Commission Act regarding appointments to the post of Chairman of the HRC in other jurisdictions as well.

[47] We have observed the petitioner relies extensively on South African equality jurisprudence, however the South African law does not support her cause of action. Most tellingly, the provisions regulating South Africa’s equivalent Human Rights Commission are substantively identical to those challenged in this litigation, and yet they have never been thought to constitute unlawful discrimination. The relevant governing statute, the South African Human Rights Commission Act 40 of 2013, provides for disqualification as follows.

*“Subject to paragraph (a), any person is eligible to be appointed as a commissioner, except—*

*...*

*(v) anyone who is an office-bearer or a staff member of a political party, a member of the National Assembly, a permanent delegate to the National Council of Provinces, a member of a provincial legislature or a member of a municipal council or who is on a candidate list for any of those positions.”*

Section 5(5)(b) reads:

*“A commissioner is regarded as having resigned if that commissioner—*

*accepts nomination for the National Assembly, the National Council of Provinces, a provincial legislature or a municipal council; or is elected or appointed as an office-bearer of a political party.”*

[48] Therefore applying international norms as specified in article 48 of our Constitution we observe that office bearer, staff members of a political party, members of the National Assembly and those specified therein are included in the restriction. In fact it goes one step further and a commissioner is regarded to have resigned from his post of



commissioner if he accepts nomination for the National Assembly, the National Council of Provinces, a provincial legislature or a Municipal Council and if elected or appointed as an office bearer of a political party. It is therefore apparent that the restriction is imposed in respect of political appointments by law are not only at the appointment stage but are prevalent even during the period of appointment.

[49] In India, its Human Rights Commission is governed by The Protection of Human Rights Act of 1993. The Act does not expressly disqualify candidates on the basis of holding office within a political party, however membership is strictly circumscribed in a few ways which are instructive for our concerns. First, in terms of section 3(2) (a)-(c) the position of Chairperson is reserved for a former Chief Justice of the Supreme Court, and two further positions are reserved for a current or former Justice of the Supreme Court, and a current or former Chief Justice of a High Court. Additionally in terms of section 4(1) those positions can only be occupied by active members of the Judiciary if they obtain the consent of the Chief Justice of the Republic. There are only two further positions open to candidates deemed to be suitably qualified by the appointment authority. Further, membership of the Human Rights Commission is further circumscribed by two provisions which are at least as restrictive as the regime we see in the Seychelles.

[50] Further it is to be observed that Section 5(3) reads:

*“Notwithstanding anything in subsection (2), the President may, by order, remove from office the Chairperson or any member if the Chairperson or such Member, as the case may be—*

*(a) ----*

*(b) engages during his term of office in any paid employment outside the duties of his office...”*

It is fair to assume that this provision is intended to exclude any candidates who receive benefit from and who owe professional allegiance to any organisation other than the Commission itself.

[51] In support of this understanding, Section 6(3) provides:

*On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of India or under the Government of any State.”*

It is abundantly clear that the right claimed by the petitioner in this case – the right to hold office as a Human Rights Commissioner while simultaneously practicing a full and unencumbered political career – is a right which would not be protected by the laws of India, on whose constitutional provisions and case law she heavily relies.

[52] In regards to other Commonwealth Jurisdictions, we observe in the jurisdictions of other Commonwealth nations such as the United Kingdom, Australia, Canada and New Zealand, the criteria for membership to their equivalent Human Rights Commissions are not extensively regulated at the statutory level, but are rather delegated to Ministers and specialist public appointments bodies, according to criteria they deem appropriate. One thing that stands out from the above that these jurisdictions all hold in common is that when it comes time to make appointments to these commissions, the expectation is that the officers selected be demonstrably “independent”, a term which is widely used interchangeably with the term “non-partisan”.

[53] It is our considered view that the petitioner would be hard-pressed to find an instance where the members of a nation’s supposedly independent and impartial human rights commission, let-alone Chairpersons or Deputy Chairpersons, are simultaneously the holders of office in political parties or the national legislature. Thus, despite the petitioner’s reliance on foreign and international materials, the international norm is decidedly on the side of the respondents; pointing to the conclusion that the exclusion of politically affiliated persons from such State bodies is a government purpose which is widely regarded to be acceptable and indeed appropriate in a democratic society.

[54] Both Learned Counsel also referred to the fact that the petitioner was being discriminated in terms of article 2 of the Covenant on Civil and Political Rights on the basis of her political affiliations to a political party or beliefs. The said Covenant refers to the fact that no person shall be discriminated on the basis of their political opinion or other opinion. It is to be observed that classification contained in section 6 (2) (a) is applicable to the holding of office in a political party and is general in nature and is not directed at any

specific political opinion as envisaged in article 2 of the said Covenant. The classification is general in nature applicable to all persons holding office in any political party and does not specifically target only the petitioner or her party or her or parties political opinions. It therefore cannot be said that the petitioner is being discriminated on the basis of her political or other opinion as envisaged by article 2 of the United Nations International Covenant on Civil and Political rights.

[55] Learned Counsel Mr. Elizabeth however submits on this basis that it is the burden on the State to prove the petitioner has in the past been biased, partial and subjective and it is not sufficient to prove perception of bias. It cannot be feasible for the State to have to carry that burden when the differentiation is made at the time of enacting legislation. It is our considered view that in this instant case, the State does not have to prove the subjective element that the petitioner herself has been biased partial or subjective as referred to by Learned Counsel for the petitioner. What the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents in our view has established is that the said law is a necessary law in a democratic society for the protection of the rights of freedoms of other persons and to impose restrictions when one holds public office (article 23(2)(c) and (d)(ii)).

[56] Therefore we are of the view that the intelligible differentia in section 6(2)(a) is based on a classification that is reasonable and there is a nexus between the classification and the objects of the Act.

[57] However, it is not as clear with regard to section 6(2)(b) as to what is the reason for including a one year “cooling off period” after ceasing to hold political office. Further, we note that this does not apply to former members of the National Assembly or the District Council in terms of section 6(2)(c) who would be able to apply to be Commissioners as soon as they were no longer in their positions despite holding political office. This provision would also effectively mean that an individual would be required to resign from their position as a political officer one year earlier in anticipation of applying for a position on the Human Rights Commission, which position would not be guaranteed. This requirement appears onerous.

[58] We appreciate that Seychelles is a small country with an active public political participation, and that a person like the petitioner may over their career get involved in politics, social justice work, private legal work and public work. One of the mechanisms which is used by the Constitution to ensure that a person is not subject to their personal biases and experiences is to insist on the swearing of an oath upon resumption of office for certain office bearers – such as Judges, the Ombudsman and, under section 5(12) of the Act, members of the Commission. This oath, subjects a person to respect and uphold the Constitution above their personal preferences. Whilst an active politician may still be subject to influence from their political party despite taking an oath (and thus the rationale of section 6(2) (a), this risk is significantly less where the individual has ceased to be actively holding office in the party.

[59] Secondly, there is no justification for the imposition of a year’s cooling off period as opposed to a month, three months, or six months. It appears to be an arbitrary period with little to no rationale.

[60] Moreover, Learned State Counsel did not provide any further reason for the imposition of this period. There was no similar provision in any of the other jurisdictions which we considered and so no external explanation could be provided or divined. In the absence of such explanation, and in the light of article 47 of the Constitution which requires restrict necessity we cannot find that section 6(2)(b) passes our constitutional scrutiny – we find that it violates the provision of Article 27 of the Constitution and therefore is void.

[61] Therefore the petitioner’s contention that she has been discriminated against by the provisions of section 5 and 6(2)(a) of the Act is unfounded and bears no merit. However, we find that the restriction created by section 6(2)(b) is unjustified and unconstitutional.

#### *Article 23 – Freedom of Association*

[62] With regard to the petitioner’s second ground for constitutional challenge, we must consider whether this limitation created by both impugned provisions on the petitioner’s article 23 right is justified under the Constitution. It is common cause that in order to apply for and take up a position on the Commission, an individual is required to divest

themselves of political office, and this limits their full and unfettered use of their right to freedom of association.

[63] At this juncture it would be pertinent to refer to the three tests that should be applied to determine the constitutionality of a limitation to Charter rights as held in the case of *Bernard Sullivan v The Attorney General & Anor SCA 25/2012* (and found to be applicable to Article 23 rights in *Seychelles National Party & Anor v GOS & Or* [2015] SCCC 2 (07 July 2015)). Firstly, a Court has to determine whether the law as framed is formulated with sufficient precision to satisfy a “prescribed law”. Secondly, whether the exception is necessary in a democratic society. Thirdly, whether there is proportionality between the restrictions the provision imposes on a fundamental right of the Charter and the objectives of the legislation identified.

[64] We have little difficulty in answering these questions. Firstly, the restriction is prescribed by law in section 5 and 6 of the Act. Secondly, for the same reasons expounded above we believe that the provisions of section 5 and 6 with the exception of section 6(2)(b) are restrictions which are not only fulfilling a legitimate government purpose (securing the independence of the SHRC from direct and perceived political interference) but are also necessary in a democratic society in order to enable an independent and fair environment in which to consider human rights grievances and improve the enjoyment of Human Rights for all persons in Seychelles. Furthermore, we have seen examples of such society’s containing similar provisions or restrictions in their domestic law. Thirdly, we do not consider it unreasonable to resign from political office in order to take up a full time position on a Public Commission.

[65] We are therefore satisfied that the law as contained in sections 5 and 6 excluding 6 (2)(b) is clear and precise, necessary in a democratic society for the protection of the rights and freedoms of citizens and there is proportionality between the law in terms of the restrictions it imposes on a fundamental right of the Charter and the objectives of the legislation identified.

[66] With regard to section 6(2)(b) for reasons already given, we struggle to define the rationale for the one year cooling off period. We believe that if there was a reason for a

cooling off period, the one year period may also go further than is strictly necessary in a democratic society (as opposed to a shorter time). Moreover, we cannot see a justification for including persons who were simply employees of a political party, such as drivers, cleaners and administrative staff in the restriction. For the purpose of this judgement for reasons given herein section 6(2)(b) has already been found to be unconstitutional. Our Learned Brother Judge Govinden further addresses this issue in his concurring opinion.

[67] For all the aforementioned reasons we proceed to make the following orders:

- a. That section 5 and section 6 with the exception of section 6(2)(b) are not in contravention of the Constitution.
- b. Section 6(2)(b) of the Act is unconstitutional as it imposes a time limit of one year on a person who has resigned from holding office in or being the employee of a political party before they can apply for a position as a Chairperson, Deputy Chairperson or a Commissioner of the Commission.
- c. Section 6(2)(b) is unconstitutional and therefore we declare it void from the date of this judgment.
- d. The Registrar of the Supreme Court is directed to transmit certified copies of this judgment to the President of the Republic and to the Speaker of the National Assembly in accordance with article 46 (6) of the Constitution: and
- e. Each party to bear their own costs.

Signed, dated and delivered at Ile du Port on 13<sup>th</sup> November 2018.

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Burhan J (Presiding)

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Govinden J

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Vidot J

**GOVINDEN J (concurring):**

[68] I hold and concur with my learned brother judges when it comes to the constitutionality of the impugned provisions of the section 5 and 6, except section 6(2) (b) of the Human Rights Commission Act, herein after also referred to as “ the Act” and their reasons that they have given for their decisions. This is my separate and further opinion on why I find that section 6(2) (b) is unconstitutional.

[69] The petitioner has prayed to this court to declare that section 5 and 6 of the Human Rights Commission Act are unconstitutional as it discriminates against the petitioner and violates her right under article 27 of the constitution and to declare that sections 5 and section 6 of the Human Rights Commission Act are inconsistent with article 5 of the constitution and cannot be condoned in a democratic society and should be declared unconstitutional and null and void.

[70] Accordingly, in this matter the petitioner is impugning and questioning the constitutionality of the totality of section 5 and 6 of the Act, including their subsections. This would include section 6 (2) (b) of the Act. This provision is to the following effect, “*A person shall not be appointed as Chairperson; Deputy Chairperson or a Commissioner if that person has ceased, to hold office in, or to be an employee of a political party for a period of not less than one year*”. This was confirmed by Mr Elizabeth, the Learned Counsel for the petitioner, during the course of the hearing, when he submitted as follows; “*the classification is not rational in fact it is irrational classification because1) the provision of the law does not only discriminate against my client because she belongs to a political party but it also say for you to be able to be eligible you must resign and wait 12 months for you to be eligible so that is going outside the sphere of reasonability in relation to my client.*”

[71] The provision of section 6 (2) (b) effectively prohibits an employee of a political party or an office bearer of a political party, which would include the Leader of a political party

according to section 2 of the Political Parties (Registration and Regulations) Act (CAP 173), from applying to the 2nd respondent for his or her name to be proposed to the 1st respondent as a Chairperson; Deputy Chairperson or a Commissioner of the Human Rights Commission within a period of one year from ceasing as an employee or an office bearer of a political party. The manner of exiting of office or of employment is not defined or particularized in the Act, however having read the expression “*has ceased*” in the context of the Act, it is my view that this would include ceasing office by way of resignation or end or determination of contract or by any other modes.

[72] This non entitlement period appear to be one similar to a restrictive covenant in contracts of employment, which contractually obligate an employee from taking up employment with another employer, usually in direct competition with the former employer, within a certain period from the end of his or her contract. The general principles regarding restrictive covenants are familiar , although post termination of covenants are , by default, void for restraint of trade and as contrary to public policy, they are enforceable where they protect a legitimate interest of the employer , and go no further than is reasonably necessary to protect that employer’s legitimate business interest (they must afford no more than adequate protection to the benefit of the party in whose favour ( they are ) imposed; *Herbert Morris LTD v/s Saxelby [1916], AC 688 at p 707*.

[73] However, the restriction is in this instance is by statute compared to a contract. For lack of a better term and for the purposes of this judgment I will term it as a “*cooling off period*”.

[74] I wish to place on record that this is the first time that I have come across such a kind of statutory provision. My research has not led me to any such kind of restrictions in other statutes. The unprecedented nature of such a provision was confirmed by the learned State Senior Counsel appearing for the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup>, when the issue of statutory precedents was raised by the court. It was her view that this provision is a novelty in our law. According to the learned Senior State she had not found similar provisions as regards 6 (2) (b) in our law.



- [75] Given the case put forward by the petitioner against the provision of this section. The following issue is left for determination when it comes to the consideration of the constitutionality of this legal provision. Does section 6 (2) (b) of the Act pass the test of the provisions of protection from discrimination of article 27 as read with article 5 of the constitution?
- [76] I concur with the findings of my learned brothers when it comes to the Constitutional Court and the Court of Appeal interpretation of article 27 and the test of permissible classification under the said article applicable in this jurisdiction.
- [77] When I apply this test to the fact of this case I find that section 6 (2) (b) has an intelligible differentia. It sets up two categories or classes of citizens. It creates a category containing office bearers of political parties and their employees and another containing any other citizens not falling within that category.
- [78] For the former category of persons the Act says that they must wait for at least one year before they are entitled to apply to the 2<sup>nd</sup> respondent for their names to be proposed to the 1st respondent for appointment as Chairperson; Deputy Chairperson or Commissioner under the Act. There is no ambiguity or lack of clarity in the existence of the differentia or differential treatment on a plain reading of the Act.
- [79] Article 27 (1) of the Constitution however forbid classification or differentia which does not rest on reasonable or rational grounds of distinction. The State cannot arbitrarily classified citizens and treat them differently just because it wants to do so, especially if the treatment is more favourable or advantageous to one group as compared to another. Hence, in this instance the classification of the office bearers of a political party and the employees of a political party as a class as compare to all the others not falling within this class has to have a rationale to the objective sought to be achieved by section 6 (2) (b).
- [80] The objects and reasons sought to be achieved by the classification could have been provided, either through expressed provisions of the Bill of the Act or the Act itself or at least the proceedings of the plenary or committee stage debates that consist of the “travaux preparatoire” of the National Assembly. These could have assisted this court in

its quest to rationalize the said classification. It is good practice to have elaborate objects and reasons of Bills presented to the National Assembly for approval, this comes handy in instances such as this one. These are usually provided for in the opening chapters of a Bill. In this case the Learned State Counsel was invited by the court to provide the reasons behind section 6 (2) (b) of the Act as reveal by its objects and reasons. However, it appear that this was not provided for in the Bill. Neither was the “travaux preparatoire” of the National Assembly provide as a secondary mode of interpretation. Accordingly, the court would have to look at the whole provisions of the Act and give to the said section a purposive interpretation and in so doing find the objects and reasons of the Sub section. Once this is done then to determine its rationality.

- [81] Having done so, I find that there might have been two objectives in the said classification, one being to allow the office bearers of a political party time to purge themselves from their political beliefs or inclinations during the cooling off period and secondly to allow enough cooling off period in order to allow these relevant candidates to detach and remove themselves from any involvements that could possible create conflicts of interest before they are appointed in office.
- [82] However, both instances I find no reasonable justification. There is nothing to show that the one year wait is essential or even necessary in order to achieve these objectives. One political inclinations or ideologies cannot be erased within one year. One political inclination is sometime for a lifetime. This period therefore appears to be an artificiality. The same applies for the waiting in order to allow or reduce potential conflicts of interest. Any involvements by the office bearers or employees of political parties in issues that could give rise to conflicts between there past conducts and their new offices would likely remain past the period set out in section 6 (2) (b).
- [83] I am of the view that a citizen can cease to be an office bearer of a political party or an employee of a political party and can apply to the 2nd respondent to be proposed for appointment to the Commission as soon as he or she cease in the said office . The cooling off period has no rational to the objective being sought by the impugned provision. Deleting section 6 (2) (b) would make the Act consonant to other laws similar to this one

wherein appointments are made by way of recommendation by the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent, without the cooling off period. These legislations are also ones that require appointees to be apolitical and to exercise total impartiality in their exercise of their respective offices. *The Anti Corruption Act ( Act 2 of 2017 )*, section 6 (1 ); *the Seychelles Broadcasting Corporation Act ( Act 6 of 2017 )*, section 4 (3) , all provides for similar mechanisms wherein the 2<sup>nd</sup> respondent considers the applications of citizens for recommendation for appointment to the 1<sup>st</sup> respondent , with no restrictions in the form of section 6 (2) (b) of the Act. Moreover, a person can be validly appointed to the office of a Judge of the Supreme Court or a Justice of Appeal, as soon as he leaves a political office provided he or she fulfils the qualifications for the post, especially the requirement of proven impartiality, again without such restriction.

[84] The irrationality of the impugned provision is even more palpable when one considers the following scenario. An office bearer of a political part or an employee of a political party may in anticipation of a vacancy in the office of Chairperson; Vice Chairperson or Commissioner, resign from office or employment one year ahead of such vacancy. Having done so he or she would submit his or her name to the 2<sup>nd</sup> respondent for its proposal to the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent is under the Act not bound to proposed his or her name to the 1<sup>st</sup> respondent and the 1<sup>st</sup> respondent even, if the name is proposed to him, is not legally bound to appoint the candidate in the respective post .In this hypothetical, but possible, scenario the employee or the office holder would find him or herself without an employment or a political career just because he or she followed the letter of the law. Another citizen candidate not falling within this class would not face similar hardship.

[85] It is for this reason that I find that s 6 (2) (b) of the Human Right Commission Act void.

[86] In accordance with article 46(6) of the Constitution, a copy of this judgment is to be forwarded to the President and the Speaker of the National Assembly.

Signed, dated and delivered at Ile du Port on 13 November 2018

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Govinden J