

[2019] CCJ 9 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ Appeal No GYCV2019/007
GY Civil Appeal No 100 of 2018

BETWEEN

ZULFIKAR MUSTAPHA

APPELLANT

AND

THE ATTORNEY GENERAL OF GUYANA

RESPONDENT

AND THE CHAIRMAN OF THE
GUYANA ELECTIONS COMMISSION

ADDED
RESPONDENT

Before The Honourables

Mr Justice Saunders, PCCJ
Mr Justice Wit, JCCJ
Mr Justice Hayton, JCCJ
Mr Justice Anderson, JCCJ
Mme Justice Rajnauth-Lee, JCCJ

Appearances

Mr Douglas Mendes, SC, Mr Chandrapratesh Satram, Mr Devesh Maharaj, Mr Mohabir Anil Nandlall, Mr Manoj Narayan, Ms Kandace Bharath and Ms Marcia Nadir Sharma for the Appellant

Mr Hal Gollop, QC, Mr Ralph Thorne, QC, Mr Basil Williams, SC and Mr Nigel Hawke for the Respondent

JUDGMENT

of

The Honourable Justice Saunders, President and
The Honourable Justices Wit, Hayton and Rajnauth-Lee,

Delivered by

The Honourable Mr Justice Saunders, President

and
CONCURRING JUDGMENTS
of
The Honourable Mr Justice Anderson and
The Honourable Mme Justice Rajnauth-Lee

Delivered on the 18th day of June 2019

JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS, PCCJ:

Introduction

[1] Reverend Justice (Retired) James Patterson (“Justice Patterson”) was appointed on 19 October 2017 by the President of the Co-operative Republic of Guyana, His Excellency David Granger, as Chairman of the Guyana Elections Commission (“GECOM”). The President made the appointment in accordance with the proviso to Article 161(2) of the Constitution.¹ Mr Zulfikar Mustapha, the Appellant (“Mr. Mustapha”), complained that the process engaged by the President in appointing Justice Patterson was flawed. He asked the Court to quash the appointment and to direct the President to choose one of 18 persons who had been nominated for appointment by the Leader of the Opposition, Dr Bharrat Jagdeo. The Attorney General, the Respondent in these proceedings, maintains that there was nothing wrong with the process and that Justice Patterson was properly appointed.

Background

[2] In its present form, the material part of Article 161 provides as follows:

161. (1) There shall be an Elections Commission for Guyana consisting of a Chairman, who shall be a full-time Chairman and shall not engage in any other form of employment, and such other members as may be appointed in accordance with the provisions of this article.

(2) Subject to the provisions of paragraph (4), the Chairman of the Elections Commission shall be a person who holds or who has held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court or who is qualified to be appointed as any such judge, or any other fit and proper person, to be appointed by the President from a list of six persons, not unacceptable

¹ Constitution of the Co-operative Republic of Guyana, CAP 1:01.

to the President, submitted by the Leader of the Opposition after meaningful consultation with the non-governmental political parties represented in the National Assembly:

Provided that if the Leader of the Opposition fails to submit a list as provided for, the President shall appoint a person who holds or has held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court or who is qualified to be appointed as any such judge.

[3] Justice Patterson's appointment followed a series of written exchanges between the President and the Leader of the Opposition between November 2016 and October 2017. At the outset, on 22 November 2016, the President invited the Leader of the Opposition to submit a 'list of six persons, not unacceptable to the President' from among whom the President would select the Chairman of GECOM. The Leader of the Opposition submitted a list of six persons on 21 December 2016. On the following day, the President requested the curriculum vitae ("CV") of each person on the list. The CVs, which were requested so as to 'guide' the President 'in making the selection', were forwarded on 28 December 2016. A few days later, on 5 January 2017, the President advised the Opposition Leader that the six nominees were 'unacceptable' within the meaning of the Constitution. The nominees were found to be unacceptable, according to the President, because their CVs did not 'seem to conform to the requirements of... Article 161(2).' The Leader of the Opposition was then urged to submit a new list of persons for the President's further consideration.

[4] The Opposition Leader sought from the President information on the kind of candidate that might find favour with the President. On 14 March 2017, the President accordingly provided a Statement of the 'Qualities of the Chairman of the Guyana Elections Commission'. According to the President's Statement:

1. The candidate should be a person who is qualified to be a Judge of the High Court under Article 129 of the Constitution and under section 5 of the High Court Act, Cap. 3:02.
2. That person should have been an Attorney-at-Law for a minimum of 7 years, according to section 5 of the High Court Act, Cap. 3:02.

3. In the absence of 1 and 2 above ‘any other fit and proper person’ should be appointed according to Article 161(2) of the Constitution.

The categories of persons specified above are necessary because such persons should have the following characteristics:

- a) That person is deemed to have wide electoral knowledge, capable of handling electoral matters because he or she is qualified to exercise unlimited jurisdiction in civil matters;
- b) That person will discharge his or her functions without fear or favour, that is, he or she will not allow any person or organization to influence him or her to compromise his or her neutrality;
- c) That person will discharge his or her functions neutrally, between the two opposing parties, as he or she would have done in Court between two opposing litigants;
- d) That person will not be an activist in any form (gender, racial, religious etc);
- e) That person should not have any political affiliation or should not belong to any political party in any form, apparent or hidden; and,
- f) That person should have a general character of honesty, integrity, faithfulness and diligence in the discharge of his or her duty as Chairman.

[5] The Leader of the Opposition submitted to the President a second list of names on 2 May 2017. Each nominee’s CV was also provided. The President, on 2 June 2017, again rejected the Opposition Leader’s submission. He found this second list also to be unacceptable within the meaning of the Constitution and the criteria set out in his Statement. Again, no specific explanation was given as to what made the list (or particular nominees named in it) unacceptable. Ten days later, on 12 June 2017, the Government and Opposition issued a Joint Statement concerning the selection of a Chairman. According to the Joint Statement, the parties (which included the President and Opposition Leader) met to ‘consult on the way forward on the selection and appointment’ of the Chairman. The parties agreed that it would be in the best interest of the people of Guyana that a GECOM Chairman be appointed without ‘undue delay’. It was also agreed that a new list would be submitted by the Leader of the Opposition.

[6] It is interesting to note that the Joint Statement also recorded the parties’ agreement that, ‘[A] high-level team would be assembled representing the

President and the Leader of the Opposition which will begin to work immediately on exploring modalities to bring a resolution to this matter in the event that the list is rejected.’² Nothing further has been said in these proceedings about what those ‘modalities’ were and whether they were ever worked out. However, before the High Court, the Solicitor General contended, through her Affidavit made on the Attorney General’s behalf, that the Joint Statement lacked any validity since the Constitution made no provision for this particular course of action.

[7] A third list of names was submitted by the Leader of the Opposition to the President on 25 August 2017. The CVs for these nominees were also provided. On 19 October 2017, the President advised the Leader of the Opposition that this third list too was ‘unacceptable’. No explicit reason for that finding was provided. Nor did the President advise as to whether he found the entire list or only particular candidates unacceptable. The Opposition Leader was informed that, in view of the rejection of this third list, the President would have resort to the proviso to Article 161(2) and appoint a Chairman ‘without further delay’. Justice Patterson was then sworn in on that very evening.

[8] In his October 19 letter, the President justified his decision unilaterally to appoint a Chairman on several bases. He first alluded to the discretion and power granted to him by Article 161(2) and its proviso. He also made reference to the presidential immunity from court scrutiny under Article 182(1) which, he claimed, empowered him to ‘act in [his] own deliberate judgment when exercising such discretion’. And he indicated that, having considered these provisions, he had decided that it would not serve the public’s interest to further delay the appointment of a Chairman. The President also sought to rely on the July 2017 ruling of the High Court in *Marcel Gaskin v The Attorney General*.³

[9] The *Gaskin* case was decided after the Leader of the Opposition had submitted to the President his second list of six names, but before the third list had been

² Ministry of the Presidency Co-operative Republic of Guyana, ‘Joint Statement -Government and Opposition on Selection of GECOM Chairperson’, as available at <https://motp.gov.gy/index.php/2015-07-20-18-49-38/2015-07-20-18-50-14/2210-joint-statement-government-and-opposition-on-selection-of-gecom-chairperson> (10 Jun 2019).

³ (Guyana HC, 17 July 2017) 2017-HC-DEM-CIV-FDA-160.

provided. Mr Gaskin had sought from the Court an interpretation of Article 161(2) of the Constitution of Guyana.

- [10] Four discrete issues were addressed by the court in *Gaskin*. The court determined that:⁴
- a. it was not the case that the list of persons for appointment as Chairman *must* include a judge, a former judge or a person qualified to be a judge. The various eligibility criteria stated in the Constitution carry equal weight;
 - b. the President is required under the Constitution to state reasons for deeming as unacceptable any of the six names on the list submitted by the Leader of the Opposition;
 - c. the President is obliged to select a person from the six names on the list unless he has positively determined that any or all of the persons on the list is/are unacceptable as not being fit and proper for appointment; and
 - d. in the event the President considers that the list contains one or more ‘unacceptable’ persons, it lies within the discretion of the President either to select an acceptable person or to reject the entire list.

[11] The problem with the *Gaskin* decision is that it proceeded on a premise, surrounding the submission of the list by the Leader of the Opposition, that renders the Constitution unworkable in practice. The court did not work into the process any opportunity for the President to be able to signal, before the formal presentation of the list, that a particular listed nominee was, for good reason, not acceptable to the President. As will be made clearer in this judgment, we consider it necessary to close this gap.

Issues for Determination

[12] The dispute in this case requires the Court to interrogate Article 161(2). What does Article 161(2) mean? What steps should be followed for it reasonably to be operationalised? What are the respective obligations of the constitutional actors referenced in the Article? How do they discharge those obligations? Is the discharge of those obligations reviewable?

⁴ Ibid at 21 and 32.

Preliminary Objections

[13] Before addressing these substantive issues, there were certain preliminary objections to Mr Mustapha's claim that must first be addressed. The Attorney General submitted that the court lacked jurisdiction in the matter and also, that Mr Mustapha had no proper standing to initiate these proceedings. The Attorney General contended that the appointment of the Elections Commission Chairman was not justiciable as it was excluded from Article 163 which reserves to the High Court exclusive jurisdiction to review specific matters including elections. He further submitted that Article 161(2) creates an executive power in the President in the nature of a convention and as such the Article was not reviewable by the courts. Finally, it was said that, even if the matter was justiciable, it is the Leader of the Opposition, and not Mr Mustapha, who was the proper party to sue; that Mr Mustapha's reliance on being a citizen, a registered elector and a Member of the National Assembly, among other things, was insufficient to establish his interest as a party to this case.

[14] These preliminary objections were raised in one form or the other in the courts below and rightly overruled. Unless specifically ousted or constrained, the court has an inherent and unfettered jurisdiction in matters relating to the interpretation of the Constitution.⁵ It is the court that authoritatively settles what the Constitution means and whether some action that is taken by a constitutional actor is within or outside that actor's constitutional remit. The Attorney General was right to note that the appointment of the Chairman of GECOM was not included in the list of matters contained in Article 163 over which the High Court has a peculiar jurisdiction. But it is precisely that omission that ensures that the court's jurisdiction to inquire into the propriety of the appointment of the Chairman is unconstrained by the strictures that attend inquiry into those matters that are embraced by Article 163. Where legitimate questions are raised by a citizen that the appointment of the Chairman of GECOM may not have been in accordance with the imperatives of the Constitution, the court is free to have resort to its inherent jurisdiction and should not turn away the person who

⁵ See: *AG v Joseph and Boyce* [2006] CCJ 3 AJ.

poses such questions. Democracy and the rule of law are nourished by both the posing of such questions and the court's answers to them.

- [15] The responsibility to appoint the Chairman of the Elections Commission is not a convention. It is a responsibility given to the President by the Constitution which prescribes the manner of its exercise. Mr Mustapha, as a citizen; a registered voter; and a member of the National Assembly representing a non-governmental party, had the necessary interest to bring this application. We agree entirely with the decisions of the courts below that these preliminary objections have no merit.

What does Article 161(2) mean?

- [16] In order to better understand the Article, it is helpful to look at its drafting history. Article 161 did not always exist in the form in which it does today. Prior to its current form, the Elections Commission Chairman was appointed by the President in his own deliberate judgment from among persons who fulfilled certain defined eligibility criteria. As originally enacted in the 1980 Constitution, Article 161(2) provided that:

Subject to the provisions of the paragraph (6), the Chairman of the Elections Commission ***shall be appointed by the President*** from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court or who are qualified to be appointed as any such judge [emphasis added].

Act 15 of 1995⁶ (“the 1995 Act”) amended Article 161. It modified the President's function in the appointment process and carved out a role for the Leader of the Opposition. The finality of the President's discretion to choose the appointee was, however, preserved.

- [17] Mr Mustapha, in his written submissions before the High Court, noted that in 1990, the then President, Hugh Desmond Hoyte, invited the Council of Freely

⁶ Act No. 15 of 1995.

Elected Heads of Government (based at the Carter Center of Emory University in Atlanta, Georgia and headed by the former United States President Jimmy Carter) and the Secretariat of the Commonwealth to observe elections that were then approaching. A proposal was made by the Carter Center for the appointment of the Chairman of the Commission. This proposal, known as the ‘Carter Formula’, provided for the submission by the opposition parties of a list of the names of six persons from among whom then President Hoyte would select a Chairman. The Carter Formula was eventually incorporated into the 1995 Act which amended Article 161. The 1995 Act provided that:

...the Chairman of the Elections Commission shall be a person who holds or who has held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court or who is qualified to be appointed as any such judge, or any other fit and proper person, to be appointed by the President from a list of six persons, not unacceptable to the President, submitted by the Minority Leader after consultation with the political parties represented in the National Assembly, other than the party to which the President belongs:

Provided that if the Minority Leader fails to submit a list as provided for, the President shall appoint a person who holds or has held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court or who is qualified to be appointed as any such judge.

[18] This formula was enshrined in the 1995 Act, but the operation of that Act came to an end by virtue of a clause limiting its operation up to a specified date. This meant that the original provision for unilateral appointment by the President, as contained in the 1980 Constitution, was revived after that date. But the matter did not rest there.

[19] A Constitutional Reform Commission (‘the Commission’) was established in January 1999. The Commission engaged in extensive consultations and public education initiatives.⁷ The largest number of recommendations made to the Commission, by both individuals and political parties, concerned the

⁷ Constitution Reform Commission, ‘Report of the Constitution Reform Commission to the National Assembly of Guyana’ (17 July 1999), 45 at [4.1] and p 48 at [4.8].

Presidency, Prime Ministership and the electoral system.⁸ Most people were concerned with curtailing Presidential power. After reviewing the numerous recommendations received, the Commission proposed a raft of changes to be made to the Constitution.

- [20] One such recommendation was that, ‘The Chairman of the [Electoral] Commission should be full-time and should be selected by *a consensual process* as provided for in the Constitution (Amendment) Act 1995 (No. 15/1995) (emphasis added).’⁹ The Commission articulated its rationale for this recommendation in this way:

In light of the historical mistrust which has surrounded the conduct and management of elections, the Commission recognised that the legitimacy of a government and the effectiveness of our system of governance depend upon the acceptance by winners and losers of the work of the Elections Commission.¹⁰

- [21] This recommendation was adopted by the National Assembly and accordingly incorporated into the Constitution (Amendment) Act No. 2 of 2000. The amendment reflected the provision in the 1995 Act with only a few minor changes in language. First, the reference to ‘Minority Leader’ was changed to ‘Leader of the Opposition’. Second, the use of the phrase ‘other than the party to which the President belongs’, to refer to non-governmental parties with whom the Leader of the Opposition must engage, was discontinued. Instead, the provision would refer to ‘the non-governmental political parties represented in the National Assembly’.

- [22] During the debates on the Bill, The Minister of Agriculture and Parliamentary Affairs, Mr Reepu Daman Persaud, in his address to the Assembly on the objective of the Bill, stated:

The Elections Commission is a pivotal component in the electoral process.
...This inclusive approach speaks well for our country and should be a pattern throughout the electoral process.

⁸ Ibid 55 at [4.24] and 56 at [4.27].

⁹ Constitution Reform Commission (n 7) 208 at [9.10.3(4)].

¹⁰ Ibid at [9.10.2].

The electoral machinery must be free, must be fair, must be impartial, and we must do everything possible to ensure that that happens.¹¹

[23] It is against this background that Article 161(2) should be understood and construed. We agree with the courts below that a purposive approach to the interpretation of the Article is appropriate. We agree too that the evolution of Article 161(2) has been characterised by a significant and deliberate shift from exclusivity and unilateralism, on the part of the President, to inclusion and consensualism. This element of inclusion secures the participation of the Leader of the Opposition in the process by which the Elections Commission Chairman is selected and appointed.

[24] The first part of paragraph (2) of Article 161 addresses in very specific terms the issue of eligibility.¹² To be eligible for appointment to the post of Chairman of the Elections Commission, the candidate must: (i) be a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court; or (ii) have held such office; or (iii) be qualified to be appointed to hold such office; or (iv) be any other fit and proper person. The phrase, ‘any other fit and proper person’ takes its colour from the preceding categories. The person may not be qualified to be appointed as a judge but could have otherwise demonstrated integrity and impartiality and have the stature, decision-making experience and academic qualifications that are analogous to those possessed by someone who falls within the preceding three categories. The names of 6 persons who satisfy any of these criteria must be submitted to the President by the Leader of the Opposition. Subject to Article 161(2), the President must then appoint one of the six nominees as Chairman.

[25] Article 161(2) states that the listed persons must be ‘not unacceptable’ to the President and that, in arriving at a list of six persons, the Leader of the Opposition is obliged to meaningfully consult with any non-governmental

¹¹ Hansard of the 47th Sitting April 2000 National Assembly Debates – Proceedings and Debates of the National Assembly of the First Session (1998- 2000) of the Seventh Parliament of Guyana under the Constitution of the Co-operative Republic of Guyana, page 5 of 47.

¹² Note too that Article 161 (1) requires that the Chairman is not to be otherwise employed and (4) disqualifies anyone who is an alien.

political parties that may be represented in the National Assembly. Article 232 of the Constitution indicates that ‘consultation’ or ‘meaningful consultation’ requires the person seeking the consultation to:

- (i) identify the persons or entities to be consulted and specify to them in writing the subject of the consultation and an intended date for the decision on the subject of the consultation;
- (ii) ensure that each person or entity to be consulted is afforded a reasonable opportunity to express a considered opinion on the subject of the consultation; and;
- (iii) cause to be prepared and archived a written record of the consultation and circulate the decision to each of the persons or entities consulted;

[26] The requirement for ‘meaningful consultation’ between the Leader of the Opposition and the non-governmental political parties that may be represented in the National Assembly is clear and needs little elaboration. What is not so clear is the process that should be followed to accommodate the spirit of consensus that must prevail between the President and the Leader of the Opposition. The Constitution envisages that this process will culminate in a list of six names being presented to the President, none of whom is unacceptable to the President. This ultimately gives the President the opportunity to select any one of those six persons as Chairman. The question is how do these two constitutional actors interact with each other so as to arrive at that culmination? We are of the view that the most sensible approach is that before a list is submitted, the Leader of the Opposition and the President *must* communicate with each other in good faith on, and perhaps even meet to discuss, eligible candidates for the position of Chairman. The aim of these discussions must be to agree the names of six persons who fit the stated eligibility requirements and who are not unacceptable to the President. In this regard, the Constitution anticipates that the Leader of the Opposition and the President will conduct themselves in a reasonable and responsible manner, eschew partisanship and seek the best interests of the Republic and the Guyanese people.

[27] In our view, employment of the double negative, ‘not unacceptable’, signals that an onus is placed on the President not to find a nominee unacceptable merely because the nominee is not a choice the President would have himself made.

The President should only find a nominee unacceptable for some good reason on objective grounds. If a President were permitted, capriciously or whimsically, without proffering a good reason, to reject eligible nominees, this would frustrate the proper working of the Constitution, defeat the intention behind the amendment to Article 161(2) and pave the way for unilateral presidential appointment.

[28] Once the President and the Leader of the Opposition have hammered out a list of names not unacceptable to the President, the list, comprising the six persons, must then formally be submitted to the President by the Leader of the Opposition and the President must then select the Chairman from among those names. This approach gives the President a role in the identification of the six names, but it obviates the possibility that, after the formal presentation of the list, the President could suggest that one or more of the names, or indeed the entire list, is 'unacceptable'. Unilateral appointment by the President in keeping with the proviso to Article 161(2) can hardly be an option if the Leader of the Opposition demonstrates a willingness to engage in good faith the process outlined above.

[29] As we stated earlier, the President's power to appoint the Elections Commission Chairman in keeping with Article 161(2) is a constitutionally prescribed responsibility that is subject to judicial scrutiny. In reviewing what transpired here between 22 November 2016 and 19 November 2017, it is evident to us that the President was not entitled to lay down, as a precondition to considering a nominee, eligibility requirements that were additional to or at variance with those prescribed by the Constitution. So, for example, it was unfortunate that the President considered or was advised that an acceptable candidate should either have or be deemed to have wide electoral knowledge and experience. As Counsel for Mr Mustapha pointed out, it is not unusual for a distinguished judge to have gone through her entire judicial career without trying a single elections case.

[30] Nothing in this judgment is intended, in the slightest degree, to cast aspersions on the competence and suitability of Justice Patterson for the position of

Chairman of GECOM. Nor is there anything to suggest that His Excellency acted otherwise than in good faith. In light of our views above on the process that should be followed, however, and given the imposition on the Leader of the Opposition of criteria that were not sanctioned by the Constitution and the absence of cogent reasons for deeming unacceptable the candidates and lists provided, we have no choice but to conclude that the process that was followed in the appointment of Justice Patterson was flawed and in breach of Article 161(2). To the extent that this judgment contradicts anything that was stated in *Gaskin*, the latter is overruled.

JUDGMENT OF THE HONOURABLE MR JUSTICE ANDERSON, JCCJ:

[31] This appeal originated in the appointment by His Excellency Mr David Granger, President of the Cooperative Republic of Guyana, of Mr Justice James Patterson to be the Chairman of the Guyana Elections Commission. Article 161(2) of the Constitution of Guyana obliges the President to make the appointment, “from a list of six persons, not unacceptable to the President, submitted by the Leader of the Opposition”. In fact, the Leader of the Opposition, Mr Bharrat Jagdeo, had, on three separate occasions, submitted separate lists each with the names of six persons. Mr Justice Patterson was not among the list of 18 persons thus submitted. His Excellency found each of the lists to be unacceptable but without giving any specific reason for their unacceptability. The President then resorted to the proviso in Article 161(2) which empowered him to make a unilateral appointment, “if the Leader of the Opposition fails to submit a list as provided for”, and pursuant to that provision appointed Mr Justice Patterson. The Appellant in these proceedings contends that this appointment was flawed and in breach of the Constitution.

[32] For substantially the reasons advanced by the learned President, I agree that the process followed in the appointment of Justice Patterson was fatally flawed and did not comport with the constitutional requirements. The history of its drafting and the wording of the provision in Article 161(2) clearly anticipate meaningful consultation, dialogue and compromise between the President and the Leader of

the Opposition in the making of the appointment. How else could the Leader of the Opposition submit to the President, “a list of six persons, not unacceptable to the President”? The President obviously retains the overriding power to make the determination as to who will be appointed because, assuming their eligibility, it is the responsibility of the Leader of the Opposition to ensure that the six persons on the list submitted to the President meets with the President’s approval. The exercise must, of course, be conducted in good faith, supported by competent advice on both sides, and with the requisite level of commitment to the Republic inherent in the competence to make such an important national appointment.

- [33] Article 161(2), therefore, requires that the list of eligible nominees for the office of Chairman of the Elections Commission be finalized through a process of consultation, dialogue and compromise between the President and the Leader of the Opposition and that this process is to be completed before the list is formally submitted by the Leader of the Opposition to the President. I am reluctant to go beyond agreeing that this process is constitutionally required on a proper interpretation of the constitutional provision. Specifically, I am unwilling, certainly at this stage, to impute a requirement in Article 161(2) to give reasons, and of particularizing the timing, nature and scope of the reasons to be given, for decisions or positions taken pursuant to the required process of consultation.
- [34] Respectfully, the requirement to give reasons found in the courts below, appeared to have meandered to an inconclusive and indecipherable end. This could well have been so because the nature of the consultative exercise contemplated by Article 161(2) does not readily lend itself to traditional notions of judicial scrutiny and judicial review. Deciding on the probity of the reasons given by the President as to why a person on the submitted list does not qualify as being ‘not unacceptable’ to him or her is not a task that the courts ought unnecessarily to invite or to be eager to undertake.
- [35] The Constitution anticipated that the appointment of the Chairman of the Elections Commission would be a cooperative endeavour between the two most

important and powerful political leaders of the Republic of Guyana. In this sense, Article 161(2), whilst clearly not a convention in the classical sense of the term, being a provision in a written Constitution not even adorned by an ouster clause, is patently in the nature of a convention or of a high political question. In these circumstances, the Court should be slow to impose constructs which exert Lilliputian constraints on the policy discourse undertaken by the Republic's political giants unless and until such constructs and constraints cannot be constitutionally avoided.

**JUDGMENT OF THE HONOURABLE MME JUSTICE RAJNAUTH-LEE,
JCCJ:**

Historical evolution of Article 161(2)

[36] In the appeal of *The Attorney General of Guyana v Cedric Richardson*,¹³ Sir Dennis Byron, then President of the Court, accepted the Report of the Constitutional Reform Commission presented to the National Assembly of Guyana on 17 July 1999 as an authoritative source of the facts stated in it.¹⁴ The Report records the political turmoil and racial violence which have been features of Guyana's political landscape.¹⁵

[37] In 1986, the Council of Freely Elected Heads of Government ("the Council"), was formed following a Consultation at The Carter Center of Emory University on "*Reinforcing Democracy in the Americas*". From September 1990, the Council began working with the people and political leadership of Guyana to construct a democratic foundation for the country. One of the objectives of the Council project in Guyana was to ensure that the general elections of October 1992 were free and fair. The Council was headed by former President of the United States, Jimmy Carter, and included several distinguished leaders, in particular, Mr George Price, then Prime Minister of Belize. In its Report entitled "*Observing Guyana's Electoral Process 1990-1992*" (commonly referred to as "the Carter Report" or "the Carter-Price Report") several

¹³[2018] CCJ 17 (AJ).

¹⁴Ibid, [31].

¹⁵Report of the Constitutional Reform Commission.

recommendations were made to improve the electoral system of Guyana. These recommendations included changes to the method of appointment of the Chairman of the Elections Commission and changes to the composition of the Commission.

- [38] In March-April 1991, a Council delegation led by Prime Minister George Price, met with the relevant parties and was able to “*forge a compromise solution which resulted in the expansion and reconstitution of the Commission*”. The Report noted:

Under the agreement both the PNC and the opposition would name two additional members of the Commission and a new chairman would be selected by President Hoyte from a list proposed by the opposition.

President Hoyte indicated that he would respond favourably to this formula if he received a letter from the opposition coalition (PCD) which (1) indicated their acceptance of the proposal, (2) pledged not to raise any further objections regarding laws affecting electoral procedures, and (3) promised to support a constitutional amendment necessary to effect the change. On April 12, the PCD sent the desired letter... Following the agreed upon formula, Rudy Collins, formerly the Guyanese ambassador to Venezuela and then CARICOM assistant secretary general was chosen as the new Elections Commission chairman.¹⁶

- [39] The Council’s formula for the appointment of the Chairman of the Elections Commission for Guyana – commonly referred to as “the Carter formula” or “the Carter-Price formula” – was introduced by way of legislation into the Constitution of Guyana in a piecemeal fashion,¹⁷ beginning in 1991 with the Constitutional (Amendment) (No. 2) Act 1991¹⁸ (“the 1991 amendment”). Although, in keeping with the provisions of the 1991 amendment, the Chairman of the Elections Commission would still be appointed unilaterally by the President, the 1991 amendment expanded the categories of persons qualified to be elected as Chairman to include “any other fit and proper person”. The 1991 amendment also increased the number of the members of the Commission -

¹⁶ Pages 20-21 of the Carter-Price Report.

¹⁷ As suggested by Counsel for the Appellant in the Court of Appeal and recorded in the judgment of Cummings-Edwards, Ch. (ag.) at [23].

¹⁸ Act No 12 of 1991.

three members appointed by the President in his own deliberate judgment and three members appointed by the President acting in accordance with the advice of the Minority Leader. The 1991 amendment, however, had a three-month sunset clause.¹⁹

[40] In 1995, the Constitutional (Amendment) Act 1995²⁰ (“the 1995 amendment”) was enacted and the formula for the appointment of the Chairman of the Elections Commission from a list of six persons, not unacceptable to the President, submitted by the Minority Leader, was introduced, albeit with a similar sunset clause. By the 1995 amendment, the Minority Leader was mandated to consult with the political parties represented in the National Assembly, other than the party to which the President belonged. In the year 2000, the Constitution (Amendment) Act 2000²¹ (“the 2000 amendment”) was enacted and the amendments to Article 161 were finally incorporated into the Constitution without a sunset clause.

[41] In 1997, general elections were held. Following those elections, there was political unrest and violence leading to the intervention of the Caribbean Community (“CARICOM”) and resulting in the signing of the Herdmanston Accord (“the Accord”) by the leaders of the two major political parties. The Accord provided for the establishment of the Constitution Reform Commission referred to earlier. It was agreed that among the matters to be addressed by the Constitutional Reform Commission would be measures and arrangements for the improvement of race relations in Guyana, including the contribution which equal opportunities legislation and concepts drawn from the CARICOM Charter of Civil Society would contribute to the cause of justice, equity and progress in Guyana.²²

¹⁹ Ending on the expiry of three months from the date of the election held, pursuant to the provisions of article 61 of the Constitution.

²⁰ Act No 15 of 1995.

²¹ Act No. 2 of 2000.

²² See: rubric “Constitutional Reform” at 4. (iii) of the Herdmanston Accord.

[42] The Report of the Constitutional Reform Commission recommended that the Chairman of the Elections Commission should be selected by a consensual process in keeping with the Constitution as reflected in the 1995 amendment.²³ As far as the selection of the Chairman was concerned, therefore, it was intended that the process would be consensual.

[43] Article 62 of the Constitution contains an important provision for the holding of free and fair elections in Guyana. Article 62 provides that elections shall be independently supervised by the Elections Commission in accordance with the provisions of Article 162. The importance of the independence of the Elections Commission therefore cannot be overstated.

[44] Several issues have been raised before us which have been comprehensively dealt with in the judgment of the Honourable President of the Court, Mr Justice Saunders. One of the questions which has been posed is whether the President is obliged to give reasons for his actions under Article 161(2).

[45] Article 161(2) provides:

Subject to the provisions of paragraph (4), the Chairman of the Elections Commission shall be a person who holds or who has held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court or who is qualified to be appointed as any such judge, or any other fit and proper person, to be appointed by the President from a list of six persons, not unacceptable to the President, submitted by the Leader of the Opposition after meaningful consultation with the non-governmental political parties represented in the National Assembly:

Provided that if the Leader of the Opposition fails to submit a list as provided for, the President shall appoint a person who holds or has held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court or who is qualified to be appointed as any such judge.

²³ See: page 209 of The Report of the Constitutional Reform Commission.

- [46] The principle of participation is an important guiding principle in the Constitution of Guyana. The Fourth Recital to the Preamble to the Constitution recognises the desire and intention of the people of Guyana to forge a system of governance which promotes “broad-based participation in national decision-making” in order to develop “a harmonious community based on democratic values, social justice, fundamental human rights, and the rule of law”. In addition, Article 13 sets out the principal objective of the political system of Guyana – ‘to establish an inclusionary democracy by providing increasing opportunities for the participation of citizens’.
- [47] The historical evolution of Article 161(2) demonstrates that it was amended to fashion a consensual process that allowed both the Government and the Opposition parties to participate in the selection of the Chairman of the Elections Commission. As mentioned earlier, in keeping with the provisions of Article 161(2) the Leader of the Opposition is obliged to have “*meaningful consultation with the non-government political parties represented in the National Assembly*”. The inclusive approach captured by Article 161(2) therefore envisions the appointment by the President of a Chairman who commands the trust and confidence of the winners and the losers of an election. There is a clear paradigm shift from absolute and unilateral power vested in the President to a consensual process enshrined in the Constitution and recommended by both the Carter-Price Report and the Constitutional Reform Commission. Rishi Persaud JA in the Guyana Court of Appeal articulated it thus: “*There was a clear shift from unilateralism to one of consensualism*”.²⁴ This is the spirit and intendment of Article 161(2) and it is the yardstick against which the course of conduct leading up to Justice Patterson’s appointment to the chairmanship of the Elections Commission should be measured.

Duty to give reasons

- [48] It was submitted on behalf of the Attorney General that the President was under no duty to give reasons for rejecting the lists submitted to him by the Leader of the Opposition. On the other hand, it was submitted for the appellant, that

²⁴Page 16 of the Court of Appeal Transcript, Ref No. 100 of 2018.

Article 161(2) was plainly intended to throw up a candidate who enjoyed support across the political spectrum. It was further argued on behalf of the appellant that Article 161(2) did not envisage a situation where the President simply declared a list to be unacceptable, without more, and proceeded to apply the proviso and to appoint his preferred candidate, even though the persons on the list were eminently suitable.²⁵

[49] It is recognized that there is no general duty for a public authority to give reasons, unless that duty is imposed by some procedure, rule or statutory provision. It is accepted however that whether such a duty exists depends on the circumstances of the case. In the case of *Re Hanoman (Carl)*²⁶ the then Chief Justice of Guyana, Justice Desiree Bernard, considered whether the Minister of Health was obliged to give reasons for rejecting two of the nominees of the Guyana Medical Association. Bernard CJ observed:

In the absence of specific legislation obliging a public functionary to give reasons for a decision, many cases indicate that the modern trend is towards openness, fairness and transparency regardless of the right that is infringed: personal, vested, public or rights acquired under schemes or plans. The overall objective is fairness based on the long-established principles of natural justice.²⁷

[50] Bernard CJ further noted:

Public officials who are charged with the responsibility of making decisions particularly those which involve the exercise of a discretion whether by acting on advice or consulting must do so with fairness and give reasons for the exercise of the discretion in a particular way so that it can be ascertained whether the discretion was exercised reasonably and, according to Lord Greene MR in *Wednesbury* [1948] 1 KB 223, 'within the four corners of the principles' he enumerated.

The exercise of a discretion is rooted and grounded in the need and duty to act fairly. This does not mean that the courts must decide whether the decision of the decision-maker is fair; this is solely the function of the person exercising the discretion. What the courts are concerned with is the decision-making process and the manner in which the discretion was exercised, and whether it was exercised fairly.²⁸

²⁵ Paragraph 60 of the appellant's written submissions filed on 25 April 2019.

²⁶ (1999) 65 WIR 157 (retired JCCJ) citing *R v Higher Education Funding Council, ex parte Institute of Dental Surgery* [1994] 1 All ER 651 and *R v Secretary of State for the Home Department, ex parte Doody* [1993] 3 WLR 154 with approval.

²⁷ *Ibid*, page 167.

²⁸ *Ibid*, page 169.

- [51] In light of this modern trend towards openness, fairness and transparency, the historical background of electoral reform in Guyana and the amendments to Article 161(2) of the Constitution, it is therefore necessary to assess whether the President was under a duty to give reasons for rejecting the lists submitted to him by the Leader of the Opposition. This leads to the question: Can there be true consensualism and participation in the decision-making process as envisioned by the Constitution of Guyana without an obligation imposed on the President to give reasons for rejecting the list submitted by the Leader of the Opposition? In my view, Article 161(2) contemplates a consensual process whereby opposition political parties in Guyana will participate in a meaningful way in the selection of the Chairman of the Elections Commission. The duty on the President to give reasons for rejecting the list submitted by the Leader of the Opposition is therefore a critical aspect of this process. The giving of reasons by the President will ensure transparency and accountability to the people, avoid unilateralism and arbitrariness, and engender public trust and confidence in the Elections Commission.
- [52] Another important consideration in determining this crucial issue is that the giving of reasons by the President for the rejection of the list will lead to acceptance of his decision to reject the list and to resort to the proviso. In my judgment, without the duty imposed on the President to give reasons for rejecting the list, the objectives of Article 161(2) would not be realized. In the absence of the reasons of the President, the question why a list was rejected by the President would remain a mystery not only to the Leader of the Opposition who submitted the list, but generally to the people of Guyana. Without the duty to give reasons for rejecting the list submitted by the Leader of the Opposition, therefore, the President could arbitrarily disregard the list submitted to him and simply apply the proviso.
- [53] I am therefore in full agreement with the judgment of Saunders PCCJ that the process that was followed in the appointment of Justice Patterson as Chairman

of the Elections Commissions of Guyana was flawed and in breach of Article 161(2) of the Constitution.

Disposition

[54] The Court will hear submissions from counsel on the Orders this Court should make given our conclusion above.

/s/ A Saunders

The Hon Mr Justice A Saunders (President)

/s/ J Wit

The Hon Mr Justice J Wit

/s/ D Hayton

The Hon Mr Justice D Hayton

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee