

IN THE SUPREME COURT

TURKS AND CAICOS ISLANDS



PETITION NO: CL 187/2016

IN THE MATTER OF THE ELECTIONS ORDINANCE 2012 (“THE ORDINANCE”)

**AND IN THE MATTER OF SECTION 53 OF THE TURKS AND CAICOS ISLANDS
CONSITUTION ORDER 2011 (“THE CONSITUTION”)**

**AND IN THE MATTER OF THE ELECTION OF PORSHA STUBBS-SMITH AS THE
ELECTED MEMBER OF THE HOUSE OF ASSEMBLY FOR ELECTORAL DISTRICT
NUMBER 6, THE BIGHT, TURKS AND CAICOS ISLANDS IN THE GENERAL
ELECTION ON 15TH DECEMBER 2016**

BETWEEN:

GEORGE C. D. PRATT

Petitioner

and

- (1) PORSHA STUBBS-SMITH**
- (2) SUPERVISOR OF ELECTIONS**
- (3) RETURNING OFFICER(ED-No.6)**
- (4) PRESIDING OFFICER (ED-No.6)**
- (5) ATTORNEY GENERAL OF THE (TCI)**

Respondents

Mr. Alvin Garland and Mr. Ashwood Forbes for the Petitioner

Mr. Ariel Misick QC with Ms. Akierra Missick for the First Respondent

Hon. Rhondalee Braithwaite - Knowles, Attorney General, for the Second, Third and Fourth Respondents

HEARD ON THE 6TH AND 7TH MARCH 2017

BEFORE THE CHIEF JUSTICE, THE HON. MARGARET RAMSAY-HALE

JUDGMENT

Introduction

1. On Election Day, 16 December 2016, the Petitioner Mr. George Pratt of the People's Democratic Party, the First Respondent, Mrs. Portia Stubbs-Smith of the People's National Party and one other candidate vied for election in Electoral District 6, the Bight, Providenciales ("ED 6"). A few ballots were discarded by the Returning Officer and after the remaining votes were tallied, it was found that an even number of votes were cast for the Petitioner and for the First Respondent. The election was called in favour of Mrs. Stubbs-Smith by the Returning Officer who, having placed the two names of both candidates in a box, pulled out the one inscribed with her name.
2. It transpired that, during the course of Election Day, one Kirlyah Rigby attended at the Polling Station but was not permitted to vote as her name was not on the list for ED 6. The Returning Officer made enquiries of the Supervisor of Elections on her behalf and was advised that the Register of Electors had been corrected and that Ms. Rigby was indeed entitled to vote in that District. A few hours later, the Supervisor of Elections sent an addendum to the voter's list and Ms. Rigby was permitted to cast her vote. Also appearing in that addendum as registered to vote in ED 6 are Berniquea Smith and Lucille Gardiner.
3. The background to these events is set out by the Supervisor of Elections in his affidavit. In it he states that on 2 March 2016, he had conducted a claims and objections hearing at the Police Canteen, an open hearing attended by representatives of the two major parties. At this hearing he assented to register Ms. Rigby and Ms. Smith in ED 6 both of whom were registered to vote in ED5 at that time. He also assented to register Ms. Gardiner in ED 6 who was registered to vote in ED 10.
4. When he was subsequently made aware that his decision to register the women to vote in the Bight had not been carried into effect, he caused the Register of Electors to be amended and sent a memorandum by email to His Excellency, the Governor on 13 December 2016, advising of this and other amendments to the Register. He asserts that, in the result, the women were entitled to be on the Voter's List as they had been registered as electors before Election Day and he was entitled to send the Addendum to the List that permitted Ms. Rigby to vote.

This Application

5. By Petition dated December 22nd 2016, Mr. Pratt seeks to have the election of Mrs. Stubbs-Smith declared null and void and that he be declared as the duly elected member of the House of Assembly for the Bight.
6. An election will be avoided where there was an irregularity which might have affected the election results: *Hanchell v Skipplings* CL 25/03, dated 19 June 2003. The three grounds on which result of the election is challenged may be summarised as follows:
 - (a) That the Supervisor of Elections had no authority to add Ms. Rigby's name to the Official Voters List for ED 6 once it had been published and delivered to the Voting Station and that

Ms. Rigby's participation in the election was a material irregularity that might have affected the outcome;

- (b) That a ballot cast for the Petitioner was improperly discarded by the Returning Officer; and
- (c) That the method adopted by the Returning Officer for selecting the winning candidate was flawed.

The Discarded Ballot

7. The complaints at b) and c) are readily disposed of. The Returning Officer's evidence is that he rejected the ballot complained of because it was his opinion that the writing on the ballot would enable the voter to be identified. The statutory requirement authority for rejecting the ballot on that ground may be found in the Elections Ordinance which provides at section 54 (4) that

*"The returning officer must,
(b) reject all ballot papers-*

....

(vi) on which there is any writing or mark by which the voter could be identified."

8. Acceding to the Petitioner's request for scrutiny of the discarded ballots, the Court ordered that they be produced to the Court. The ballot boxes were unsealed in open Court and all parties scrutinised all the discarded ballots. The Court indicated, at the time of the scrutiny, its concurrence with the opinion of the Returning Officer that the mark on the ballot was suggestive of a signature and its view that the ballot had been properly discarded.

Decision by Lot

9. The Ordinance provides at section 54 (16) that,

"Whenever after counting (including a recount) there is an equality of votes between two or more candidates and the addition of one vote would entitle one of the candidates to be declared elected, the returning officer must decide between the candidates by lot and proceed as if the candidate on whom the lot falls had received an additional vote."

10. The ordinance does not prescribe how the lot must be performed, but the learned editors of Schofield's Election Law state, in a passage where they consider a provision in the **Representation of the People Act 1983**¹ which is in the same terms, that,

"The method of taking the lot is for [the returning officer] to decide but it is suggested that an appropriate method would be for each candidate to write on a blank piece of paper their names and

¹ RPA 1983 Sch.1.r .49

for the names to be placed in a receptacle and for the returning officer to withdraw one piece of paper and add a vote to that named candidate's total.”²

which was precisely the method adopted here.

11. Mr. Garland does not complain of the method chosen *per se*, but says that the Returning Officer folded the pieces of paper himself and, in consequence of that, may have been able to differentiate one piece of paper from the other by feel. The suggestion is that he favoured Mrs. Stubbs-Smith and chose that piece of paper that would determine the election in her favour. There is simply no evidence to support the assertion. The length of time the Returning Officer took to retrieve one of the two pieces of paper, which is a matter Mr. Garland relies on in support of his contention, could have been the result of the size of the receptacle he chose to put the pieces of paper in which has been described as a large box and the fact that that he elevated it above his head and shook it before he reached in, still holding it above his head, to withdraw the piece of paper.
12. There is no merit in this ground.

The Voter's List

13. Mr. Garland submits that it was a material irregularity in the election process for the Supervisor of Elections to add Ms. Rigby's name to the Voter's List on the day of the election to permit her to vote and that he thereby contravened section 80 of the Ordinance.
14. The section, which is headed "**Conclusiveness of the Official List of Voters,**" provides that,

"At any election a person shall not be entitled to vote unless his name is on the official list of voters for any electoral district for the time being in force by virtue of this Ordinance. Every person whose name is on the list shall, subject to this Ordinance, be entitled to demand and receive a ballot and to vote..."
15. The Attorney General makes the point that the persons entitled to vote are the persons whose names appear on the Register of Electors which is maintained by the Supervisor of Elections. Mr. Garland's response is that section 80 of the Ordinance which was amended in 2012 provides that the Official Voter's List, and *not* the Register of Electors maintained by the Supervisor of Elections,³ is conclusive of a persons' right to vote. He contends that the Official Voter's List is the list delivered to the polling station on Election Day and that this list cannot be altered by amendment once it is published.

² Third Edition para 11-041

³ Section 78 of the Elections Ordinance 1998 provided that "*At any election a person shall not be entitled to vote unless his name is on the Register of Voters for any electoral district...and every person whose name is on such Register, shall...be entitled to demand and receive a ballot paper and to vote.*"

16. The Ordinance at section 36 (2) (d) provides that the Returning Officer shall provide each Presiding Officer with a copy of the official list of voters showing only the names, occupations and addresses of the voters. The Attorney General submits that "*Official Voters List*" is not a forensic term but refers to the list of all persons registered to vote derived from the Register of Electors maintained by the Supervisor of Elections which, pursuant to the Ordinance, should have been published in the format prescribed by the Ordinance in **Form 16** of the first Schedule.
17. No list in that particular form was delivered by the Returning Officer to the Presiding Officer at the polling station in ED 6. What was provided was a copy of the Register of Electors. Throughout Election Day, election officials populated the Form 16 List as each registered voter cast his or her vote. There appears to be some confusion as to the requirement set out in section 36 (2)(d) but the failure to prepare the Form 16 Official Voter's List was an instance of non-compliance with the section which does not meet the test set out in **Woodward v Sarsons and Sadler** [1875] L.R. 10 CP 733, that "*to render an election void...by reason of a non-observance of or non-compliance with the prescribed rules or forms given therein, such non-observance or non-compliance must be so great as to satisfy the tribunal before which the validity of the election is contested that the election has been conducted in a manner contrary to the principle of an election by ballot and that the irregularities complained of did affect or might have affected the result of the election.*"
18. The list that was delivered to the polling station was sufficient to ensure that all registered electors ED 6 were able to vote. All that is, except Ms. Rigby whose name did not appear. Mr. Garland accepts that the form doesn't matter and that, in practical terms, the official voting list was that copy of the Register of Electors that was delivered to the Polling Station on Election Day. He maintains, however, that by virtue of section 80, that list was final and could not be amended.
19. With that proposition I am unable to agree. If the Voter's List is the list of all persons registered to vote as appear in the Register of Electors, then any list which, through error or inadvertence, does not reflect the actual Register of Electors must be amended. A registered elector ought not to be deprived of his vote because of an error in the office of the Supervisor of Elections. To hold otherwise would be, as Mr. Misick QC submits, and the learned Attorney General agrees, contrary to the principle enunciated by the Privy Council in **The Montreal Street Railway Company v Roch Normandin** [1917] UKPC 2, that

"When the provisions of a Statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."
20. It would cause great injustice to Ms. Rigby, who has no control over the persons entrusted with preparing the voter's list, if the neglect to publish a list in which her name appeared as a person

registered to vote in ED 6 were held to deprive her of the right to vote. Indeed, to hold that section 80 were more than directory would be to deprive her of a right guaranteed by the Constitution which provides at clause 55(5) that,

“A person registered to vote as an elector shall be entitled to vote at an election.... [except where]

(a) He or she is not registered as an elector in that electoral district; or

(b) He or she has voted in another electoral district.”

Summary

21. The uncontroverted evidence of the Supervisor of Elections is that Ms. Rigby was a registered elector. Her claim to be registered as a voter in ED 6, instead of ED 5 where she had been previously registered to vote, was assented to by the Supervisor of Elections. The Register of Electors was amended and the Governor advised of the amendment by email on 13 December 2016. She was, therefore, entitled under the Constitution to vote in ED 6. In order to permit her to vote on Election Day, the list of voters which had been delivered to the polling station had to be amended. This was done by the Supervisor of Elections who caused an amendment to the list to be delivered to the polling station.
22. In my judgment, the Supervisor of Elections acted properly. To hold otherwise would not be to promote the main object of the Ordinance or the relevant Constitutional provision.
23. The Petition is dismissed. I will hear Counsel on costs.

Dated 20 April 2017

Alexis
CHIEF JUSTICE

