[2011] UKPC 45
Privy Council Appeal No 0070 of 2010

JUDGMENT

Dany Sylvie Marie and Dhojaven Vencadsamy and others (Appellants) *v* The Electoral Commissioner, The Electoral Supervisory Commission and The State of Mauritius (Respondents)

From the Supreme Court of Mauritius

before

Lord Walker
Lady Hale
Lord Clarke
Sir Paul Girvan
Sir Terence Etherton

JUDGMENT DELIVERED BY LORD CLARKE ON

20 DECEMBER 2011

Heard on 25-26 October 2011

Appellant
Rex Stephen
Michel Ammee

(Instructed by Astor Law Practice)

Respondent
Geoffrey Cox QC
Sir Hamid Moollan QC
Aruna Narain

(Instructed by Attorney General's office)

LORD CLARKE:

INTRODUCTION

1. The applicants proposed to stand as candidates in the general election to be held in Mauritius on 5 May 2010. To that end they submitted nomination papers to the relevant returning officers. However, in each case they did so without making a declaration as to the community to which they belonged. Each of the returning officers rejected the nomination papers as invalid by reason of the failure to make that declaration. The applicants challenged those decisions in the Supreme Court of Mauritius. They did so by way of notice of motion dated 21 April 2010 in which they sought an order directing the returning officers to insert the names of the applicants in the list of candidates for the election on 5 May. The application was heard by Mungly-Gulbul J ("the judge") on 23 and 26 April and was refused on 26 April. She gave her reasons for her refusal on 30 April 2010 and the election took place on 5 May, without any of the applicants being candidates.

2. It was not possible for the applicants to appeal against that refusal because paragraph 4(4) of the First Schedule to the Constitution of Mauritius provides that in such a case "the determination of the Judge shall not be subject to appeal". No doubt because of that provision the applicants have not sought to appeal to the Court of Appeal in Mauritius. Instead they have applied to the Judicial Committee of the Privy Council for special leave to appeal against the decision of the judge. A panel (Lord Walker, Lord Collins and Sir John Dyson) considered the application on paper and directed that the application be heard orally, with the appeal to follow if leave was granted.

3. Three issues were raised in the course of oral argument. They were (1) whether the Judicial Committee has jurisdiction to grant special leave, (2) if it has, whether leave should be granted in this case and (3) if leave is granted, whether the appeals should be allowed. The Board heard full argument on each of those issues and, so far as is appropriate, will consider them in turn.

The issues before the judge

4. Although the relief sought in the application to the judge was expressed in narrow terms, namely an order directing the returning officers to insert the names of

the applicants in the list of candidates for the election on 5 May, the application raised constitutional questions of some importance, which have been considered by the courts in Mauritius on a number of occasions. Indeed, the judge would have granted the applications but for the fact that she was bound to refuse them by the decision of the Full Bench of the Supreme Court in *Electoral Supervisory Commission v Attorney General* (2005) SCJ 252, (2005) MR 42. In that case the Supreme Court reversed an earlier decision by Balancy J in *Narrain v Electoral Commissioner* (2005) SCJ 159, (2005) MR 99.

5. The Board has been provided with a list of applicants, which comprises 60 or 61 individuals who are said to belong to political parties, 32 individuals who are said not to belong to any political party and four others, three of whom are political parties and one of whom is described as a political alliance. The judge described the issues as being (1) whether, on its true construction, paragraph 3 of the First Schedule to the Constitution should be interpreted as giving authority to the Mauritian Parliament to provide in regulation 12(5) of the National Assembly Elections Regulations ("the Regulations") that a nomination is invalid if a declaration as to community has not been made and (2) whether regulation 12(5) is ultra vires the Constitution. These are important constitutional questions, which the applicants wish to revisit in an appeal to the Privy Council. They are not narrow questions of specific relevance only to a particular general election. Before considering the three issues identified above, it is appropriate to take note of the provisions of the Constitution and of the Regulations which are relevant for present purposes.

The Constitution and the Regulations

6. Chapter I of the Constitution contains sections 1 and 2. By section 1, it is provided that Mauritius shall be a sovereign democratic State and shall be known as the Republic of Mauritius. By section 2, any other law which is inconsistent with the Constitution is declared to be void. Chapter II contains sections 3 to 19 and sets out the protection of fundamental rights and freedoms of the individual. Sections 11 and 16 provide for the protection of freedom of conscience and for the protection from discrimination respectively. By section 17, any person who alleges an infringement of sections 3 to 16 may apply to the Supreme Court for redress. That right is expressly without prejudice to any other action with respect to the same matter that is lawfully available.

7. Chapter III provides for citizenship and Chapter IV provides for the President and the Vice-President of the Republic. Chapter V provides by section 31(1) that Parliament shall consist of the President and the National Assembly and, by section 31(2), that the Assembly shall "consist of persons elected in accordance with the First Schedule", which makes provision for the election of 70 members. Sections 33 and 34 specify who is qualified to become and who is disqualified from becoming a

member of the General Assembly. It is not suggested that the applicants do not qualify for membership within section 33.

8. The First Schedule is central to the issues which the applicants seek to raise in their proposed appeal. It is set out in full in Annex A to this judgment. It describes in detail the electoral system in Mauritius, which has a total of 70 seats. Of those 70 seats, 62 are to be filled by directly elected candidates as described in paragraph 5(1). The remaining eight seats are allocated as set out in detail in paragraph 5(8). The intention behind this was to provide for minority interests to be represented in Parliament while at the same time respecting the overall result of the election. This became known as the best loser system, which the Board will consider further below. The procedural method adopted for the operation of the system is, by paragraph 3(1), to require candidates to declare to which community he or she belongs in a published notice of nomination.

9. The critical provisions are paragraphs 3(2), (3) and (4), which provide:

> "(2) Within 7 days of the nomination of any candidate at an election, an application may be made by an elector in such manner as may be prescribed to the Supreme Court to resolve any question as to the correctness of the declaration relating to his community made by that candidate in connection with his nomination, in which case the application shall (unless withdrawn) be heard and determined by a Judge of the Supreme Court, in such manner as may be prescribed, within 14 days of the nomination, and the determination of the judge shall not be subject to appeal.
>
> (3) For the purposes of this Schedule, each candidate at an election shall be regarded as belonging to the community to which he declared he belonged at his nomination as such, or if the Supreme Court has held in proceedings questioning the correctness of his declaration that he belongs to another community, to that other community, but the community to which any candidate belongs for those purposes shall not be stated upon any ballot paper prepared for those purposes.
>
> (4) For the purposes of this Schedule, the population of Mauritius shall be regarded as including a Hindu community, a Muslim community, a Sino-Mauritian community; and every person who does not appear, from his way of life, to belong to one or other of those 3 communities shall be regarded as belonging to the General Population, which shall itself be regarded as a fourth community."

10. The Board was told that until this case there had only been one challenge under paragraph 3(2) to the correctness of a declaration relating to community. That was in the case of *Parvez Carrimkhan v Tin How Lew Chin* (2000) SCJ 264. Like the applicants in this case, the respondents disapproved of the best loser system. They only entered a community on the form in order to be able to stand and they chose a community only after the drawing of lots. It appears that, again like the applicants here, they did not intend to take one of the eight seats available under the best loser system. Seetulsingh J discussed some of the problems of deciding what community a person belongs to. Not unnaturally, he rejected the declaration of community based on the drawing of lots. He said that he was unable to decide whether, from their way of life, the respondents belonged to the Hindu, Muslim or Sino-Mauritian communities. He held that, in these circumstances, the only alternative was to hold that they each belonged to the fourth category identified in paragraph 3(4), namely the General Population. In the light of the substantive issues between the parties in the proposed appeal, it is perhaps noteworthy that Seetulsingh J said that he understood that a project of electoral reform was on the cards and expressed the hope that what he regarded as defects in the system would be remedied in the near future. The Board was told much the same in the course of argument.

11. Paragraph 4(1) and (2) of the First Schedule provide in effect that every candidate shall make a declaration in such manner as may be prescribed and that there shall be such provision as may be prescribed for the determination by a returning officer of questions concerning the validity of such a nomination. Paragraph 4(3) provides that, where a returning officer decides that a nomination is valid, his determination shall not be questioned in any proceedings other than proceedings under section 37 of the Constitution. Section 37 gives the Supreme Court jurisdiction to hear and determine, inter alia, any question whether any person has been validly elected as a member of the Assembly. Section 37(2) to (5) make detailed provisions for such an application, which is a direct application to the Supreme Court. Section 37(6) provides that a determination under the section shall not be subject to appeal, provided that an appeal shall lie to the Judicial Committee of the Privy Council in such cases as may be prescribed by Parliament. So far as the Board is aware, no such cases have been prescribed by Parliament.

12. By contrast, paragraph 4(4) provides that, where a returning officer decides that a nomination is invalid, his decision may be questioned upon an application to the Supreme Court made within such time and in such manner as may be prescribed and the determination of the judge shall not be subject to appeal. This is such a case because the returning officers declared each nomination to be invalid for want of a declaration as to community and the applicants applied to the Supreme Court under paragraph 4(4), so that it follows that the determination of the judge on those applications "shall not be subject to appeal".

13. As appears above, the First Schedule made provision for various aspects of the procedure to be prescribed. They were prescribed in the Regulations. For present purposes it is only necessary to refer to regulation 12, which makes detailed provisions for the nomination of candidates. It provides a tight timetable. Regulation 12(3) provides that the nomination paper for each candidate shall be in Form 4, which is attached to the Regulations and includes a declaration that he or she is a member of a specific community, which must be one of the four communities described in paragraph 3(4) of Schedule 1 to the Constitution. Form 4 is thus consistent with regulation 12(4)(c), which provides that, each candidate must make a declaration, in the case of a general election, "as to which of the Hindu, Muslim, Sino-Mauritian or General Communities he belongs".

14. Regulation 12(5) provides that if such a declaration is not made in conformity with the provisions of paragraph (4), which of course includes paragraph (4)(c), the nomination of the candidate shall be void and of no effect. The applicants submitted to the judge and wish to submit to the Board that regulation 12(5) is contrary to the Constitution and therefore void. They did not submit that any provision of the First Schedule is void, presumably on the basis that it is part of the Constitution and cannot therefore be void.

15. As stated above, the applicants chose to challenge the decisions of the returning officer rejecting the nominations as invalid, or void and of no effect, by reason of the candidates' failure to make a declaration as to the community to which they belonged by applying to the Supreme Court under paragraph 4(4) of the First Schedule. It follows from the express terms of that paragraph that the decision of the Supreme Court that the nominations were invalid is not subject to appeal. The question is whether, notwithstanding that provision, the applicants can challenge the decision by seeking and obtaining special leave to appeal to the Judicial Committee of the Privy Council.

16. It is common ground that, whatever the answer to that question, there are other ways in which the applicants can challenge the constitutionality of regulation 12(5) of the Regulations. As already stated, they can do so under section 17 of the Constitution in so far as they allege an infringement of their rights under sections 3 to 16, which of course include the right to freedom of conscience under section 11. Section 83 provides other circumstances in which the Supreme Court has original jurisdiction in relation to constitutional questions but, by section 83(5), it expressly provides that nothing in the section shall confer jurisdiction on the Supreme Court to hear or determine any such question as is referred to in section 37 or paragraphs 2(5), 3(2) or 4(4) of the First Schedule otherwise than upon an application made in accordance with that section or any of those paragraphs.

17. The Board will consider section 81 of the Constitution, which is entitled Appeals to the Judicial Committee under the next heading, where it considers the jurisdiction of the Judicial Committee to grant special leave in this case.

18. Section 47 provides how the Constitution can be altered by Parliament. For present purposes it is sufficient to note that by section 47(3), section 1 cannot be altered unless the Bill has first been submitted to the electorate by referendum and has been approved by the votes of not less than three quarters of the electorate and the Bill is supported at the final voting in the Assembly by the votes of all the members of the Assembly. By section 47(2) there are a number of provisions, including the First Schedule, which can only be altered if the proposed alteration is supported at the final voting by not less than three quarters of all the members of the Assembly.

Jurisdiction of the Judicial Committee

19. Section 81 of the Constitution is annexed to this judgment as Annex B. By section 81(1), it provides that an appeal shall lie as of right from decisions of the Supreme Court or of the Court of Appeal (which is a division of the Supreme Court) in certain circumstances. They include appeals from (a) final decisions in any civil proceedings on questions as to the interpretation of the Constitution and (c) final decisions in proceedings under section 17. By section 81(2), an appeal shall lie with the leave of the Supreme Court or the Court of Appeal where in the opinion of the Court the question is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Judicial Committee. However, like section 83(5), section 81(3) provides that subsections (1) and (2) are subject to section 37(6) and paragraphs 2(5), 3(2) or 4(4) of the First Schedule, that is that no appeal shall lie to the Judicial Committee as of right or by leave of the Supreme Court or the Court of Appeal in a case where the validity or invalidity of a nomination or the correctness of a declaration relating to community is determined by the Supreme Court.

20. On the face of it section 81(3) appears to provide that no appeal shall be brought to the Judicial Committee in such a case. This is of course such a case because, at any rate in form, the applicants seek to challenge the decision of the judge that the decisions of the returning officers that the nominations of the applicants were invalid. However, section 81(3) is itself subject to section 81(5) which provides that nothing in section 81 (and thus nothing in section 81(3)) shall affect "any right of the Judicial Committee to grant special leave to appeal from the decision of any court in any civil or criminal matter**"**. Section 81(5) originally provided:

> "Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal to Her Majesty in Council from the decision of any court in any civil or criminal matter."

It was amended to its present form in 1991 by section 16 of the Constitution of Mauritius (Amendment No 3) Act 1991 in order to set out the position when Mauritius became a Republic.

21. Two questions have arisen under section 81(5). They are whether this is a civil matter within the meaning of the subsection and, if so, whether the Judicial Committee has jurisdiction to grant special leave in these circumstances.

22. The meaning of the expression "civil … matter" was considered obiter by the Judicial Committee in *Goinsamy Chinien v The Attorney General and The Mauritius Bar Association* on 9 March 2000. The Board in that case, comprising Lord Hutton, Lord Hobhouse of Woodborough and Lord Millett, considered a petition for special leave by a barrister against a decision of the Supreme Court of Mauritius refusing to reinstate his name on the roll of practising barristers. It held that the barrister had no right of appeal under section 81(2)(a) of the Constitution because, when the judges acted to suspend or strike off a barrister they were not acting as a court of law but as a disciplinary authority, so that the proceedings were not "civil proceedings" within paragraph (a): see p 8, where Lord Hutton adopted the principle to that effect stated by Lord Denning in *Attorney General of The Gambia v N'Jie* [1961] AC 617, 631.

23. The Board then considered whether such proceedings were a civil matter within section 81(5). In the last paragraph of the judgment of the Board Lord Hutton said this:

> "Section 81(5) refers to 'any civil … matter' whereas sections 81(1) and (2) refer to 'any civil proceedings'. Having regard to this difference in wording and to the former right of a legal practitioner suspended or struck off by the judges of a colony to petition her Majesty in Council to restore him it can be argued that giving a purposive construction to section 81(5) there is jurisdiction for the Judicial Committee to grant special leave. Their Lordships do not propose to express a concluded opinion on this point as, if the jurisdiction does exist, it should only be exercised in special circumstances and they are satisfied that no such circumstances exist in this case."

24. In the opinion of the Board this is a civil matter. It is not a disciplinary process, so that the conclusion that the disciplinary proceedings were not civil proceedings within section 81(1)(a) does not apply to these proceedings. It is the provisional view of the Board that both these proceedings and proceedings under section 17 or 83 of the Constitution are civil proceedings within the meaning of section 81(2)(a). If that is correct, there can be no doubt that this is a civil matter.

25. Even if these are not civil proceedings, the Board can see no reason why they should not fairly be regarded as a civil matter. This seems to the Board to be consistent with the approach of the Judicial Committee to the equivalent provision in the Gibraltar Constitution, where in *Ford v The Queen* [2003] UKPC 35, 9 April 2003, the Board described it as being in the widest terms. In any event the claim for a declaration that the decision of each returning officer that the declaration was invalid would naturally be regarded as a claim in a civil matter.

26. The question remains whether the Judicial Committee has jurisdiction to grant special leave in such a case. The Board has concluded that the answer to this question depends upon whether there is a Mauritian statute that "either expressly or by necessary intendment" shows that the power of the Judicial Committee to grant special leave in such a case has been excluded. The steps that have led the Board to reach that conclusion are these.

27. In 1987 David Swinfen set out the origins of special leave in his book *Imperial Appeal* at pp 12-13. A litigant in a colony who sought to have his appeal heard before the Privy Council could do so in two ways, either by appeal as of right or by special leave of the Judicial Committee. The appeal as of right derived historically from the ancient privilege of the subject to seek redress at the foot of the throne, but it was a right which existed only where it had been specifically created, by statute or otherwise, and it was subject to regulation by various means including colonial legislation. It was accepted that colonial legislatures could regulate the appeal as of right and could indeed extinguish it. By contrast, the position was different in the case of appeal "as of grace" by special leave. Swinfen put it thus:

> "The appeal as of grace derived from the inherent prerogative right of the Crown to exercise an appellate jurisdiction, and where a suitor was not entitled to an appeal as of right, he could nevertheless petition the Judicial Committee itself for special leave to appeal."

28. It is now clear that the Judicial Committee's power to grant special leave is no longer founded upon the royal prerogative itself, but instead arises under the provisions of the Judicial Committee Act 1833 ("the 1833 Act") and the Judicial Committee Act 1844 ("the 1844 Act"). Thus in *Campbell v The Queen (Jamaica)* [2010] UKPC 26, [2011] 2 AC 79, Lord Mance, giving the judgment of the Board, explained at para 6 that:

> "the royal prerogative power to grant special leave was regulated and restated by the provisions of section 3 of the Judicial Committee Act 1833 and section 1 of the Judicial Committee Act 1844."

Similarly, in *Walker v The Queen* [1994] 2 AC 36 Lord Griffiths stated at p 44:

> "Whatever may have been the original powers of the Privy Council, the powers of the Judicial Committee of the Privy Council are now governed by the Acts of 1833 and 1844 which must be recognised as superseding the royal prerogative: see *Attorney General v De Keyser's Royal Hotel Ltd* [1919] 2 Ch 197; [1920] AC 508."

29. Section 3 of the 1833 Act provides:

> "All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute, or custom, may be brought before his Majesty or His Majesty in Council from or in respect of the determination, sentence, rule, or order of any court, judge, or judicial officer, and all such appeals as are now pending, and unheard, shall from and after the passing of this Act be referred by his Majesty to the said Judicial Committee of his Privy Council, and such appeals, causes, and matters shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to his Majesty in Council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by his Majesty to the whole of his Privy Council or a committee thereof (the nature of such report or recommendation being always stated in open court)."

30. Section 1 of the 1844 Act provides inter alia:

> "It shall be competent for Her Majesty, by any order or orders to be from time to time for that purpose made with the advice of her Privy Council, to provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any court of justice within any British colony or possession abroad, although such court shall not be a court of errors or a court of appeal within such colony or possession; and it shall also be competent to Her Majesty, by any such order or orders as aforesaid, to make all such provisions as to her Majesty in Council shall seem meet for the instituting and prosecuting any such appeals …"

Section 1 includes a number of provisos, including a proviso that "any such order as aforesaid may be either general … or special and extending only to any appeal to be brought in any particular case."

31. It is clear from the broad and unqualified statutory language that the Judicial Committee has a general power to grant special leave under the 1833 and 1844 Acts. The question then arises whether and to what extent a state can act to restrict this power.

32. In this respect it may again be helpful briefly to consider the historical background, which Swinfen explains in *Imperial Appeal* in this way:

> "The power of the Committee to grant such a petition [for special leave] being a prerogative power, it was not considered to be amenable to colonial or dominion legislation, and could not therefore be abolished by a Dominion unilaterally. The debate in the nineteenth and twentieth centuries over retention or abolition of the right to appeal centred therefore on this prerogative power to grant special leave. Of the older Dominions, South Africa alone was able to claim the constitutional authority to end this mode of appeal as and when she wished to do so. For the rest, their power to end the system of appeal by special leave was not finally established until the passage of the Statute of Westminster in 1931."

33. The case cited as authority for the proposition in the last sentence is *British Coal Corporation v The King* [1935] AC 500, where, after reviewing the historical position in some detail, the Judicial Committee held that following the 1931 Statute of Westminster the Canadian legislature could abrogate the Privy Council's power to grant special leave. In reaching that conclusion, the Board held that in order to oust the Judicial Committee's jurisdiction to grant special leave, domestic legislation must remove the power either by the use of "express words" or by "necessary intendment": see in particular pp 519 and 522.

34. In *De Morgan v Director-General of Social Welfare* [1998] AC 275, the Board summarised the position thus at p 284:

> "The result of this analysis is that by excluding or limiting the rights of the Privy Council to grant special leave to appeal a New Zealand statute is not, in any ordinary sense, purporting to limit the royal prerogative. It is limiting what is in substance a statutory right with a purely formal prerogative element attached. In the *British Coal* case [1935] AC 500, 519 it was said that in order for a statute to exclude or limit that right it had to do so by 'express words or by necessary intendment' … It was held that the relevant statute in the *British Coal* case [1935] AC 500 had given the power to exclude the right 'by necessary intendment' although there were not any express words authorising that result. That decision

was followed and extended to the abolition of civil appeals from Canada in the *Attorney General for Ontario* case [1947] AC 127.'

35. More recently, in the Jamaican case *Grant v Director of Correctional Services* [2004] UKPC 27, [2004] 2 AC 550 the Board restated the general position regarding special leave:

> "The nature of the Crown's right to grant special leave to appeal was considered most recently by the Board in *De Morgan v Director-General of Social Welfare* [1998] AC 275. The Board held that the right to entertain appeals to the Privy Council is no longer a wholly prerogative power but is regulated by the Judicial Committee Acts 1833…and 1844… It is not a normal prerogative power of the Crown. Lord Browne-Wilkinson said, at p 285, that it is 'at best, a power which is in substance statutory, being regulated by the Judicial Committee Acts, with a vestigial and purely formal residue of the old prerogative powers'. Accordingly, express words are not required to limit or abolish the right to entertain such appeals. It is enough if the statute excluding the right of appeal to the Privy Council shows 'either expressly or by necessary intendment' that the power to entertain such appeals is to be abolished."

36. Two points emerge clearly from these authorities. First, independent States such as Mauritius are able to limit or abrogate the Judicial Committee's ability to grant special leave to hear appeals from the courts of that State. Secondly, the Judicial Committee's power to grant special leave will remain intact unless and until the State enacts legislation which removes the power either expressly or by "necessary intendment".

37. What then is the position in Mauritius? The answer depends upon the construction and effect of the Constitution and such Mauritian statutes as are relevant. However, it is first appropriate to notice the Mauritius Republic Act 1992 ("the 1992 Act"), which provides by section 2, so far as material, as follows:

> "2 — Judicial Committee of Privy Council
>
> (1) Her Majesty may by Order in Council confer on the Judicial Committee of the Privy Council such jurisdiction and powers as may be appropriate in cases in which provision is made by the law of Mauritius for appeals to the Committee from courts of Mauritius.
>
> (2) An Order in Council under this section may contain such incidental and supplemental provisions as appear to Her Majesty to be expedient.

…

(5) Except so far as otherwise provided by or in accordance with an Order in Council under this section, and subject to such modifications as may be so provided, the Judicial Committee Act 1833 shall have effect in relation to appeals in respect of which jurisdiction is conferred under this section as it has effect in relation to appeals to Her Majesty in Council."

38. The Mauritius (Appeals to Judicial Committee) Order 1992 was made pursuant to the 1992 Act. By the express terms of para 2(1) of the Order, the Judicial Committee's jurisdiction to hear appeals from Mauritius is determined by section 81 of the Constitution. By para 2(2), the provisions of the 1833 Act and any rules made under it were made applicable to proceedings under section 81 with such modifications as might be necessary by reason of the nature of the proceedings or otherwise to bring them into conformity with the provisions of the Constitution.

39. Section 81 is therefore the constitutional touchstone for establishing the scope of the Judicial Committee's jurisdiction to hear appeals against decisions of the courts in Mauritius. In this regard it is important to identify the scope of section 81(5). Section 81(5) does not itself confer a right upon the Privy Council to entertain appeals by way of special leave. It does not itself purport to create or demarcate the scope of any such right. It does no more than preserve any right which might otherwise exist. The almost identical provision in section 110(3) of the Jamaican Constitution was considered by the Judicial Committee in both *Grant* and *Campbell*.

40. In *Grant* the Judicial Committee was required to decide whether a Jamaican statute which prevented an appeal to the Privy Council pursuant to special leave was compatible with section 110(3) of the Jamaican Constitution. The Judicial Committee held that it was compatible. In reaching this conclusion, the Board explained that:

> "Section 110(1) and (2) grant defined rights of appeal to the Board. Section 110(3) is expressed in negative terms. It does not grant any rights. Entitlement to an appeal to the Board on special leave granted by the Board does not derive from this provision, or any other provision, in the Constitution. Entitlement to such an appeal derives from the Judicial Committee Acts, continued in force on independence along with all other existing laws by section 4(1) of the Jamaica (Constitution) Order in Council 1962. On its face the evident purpose of section 110(3) is confined to ensuring that the rights of appeal to the Board conferred by section 110(1) and (2), which make no mention of the Board's right to grant special leave, are not to be taken impliedly to exclude or affect the latter right. Section 110(3) assumes the existence of such a right,

> although the draftsman has carefully catered for the possibility of change by using the phrase 'any right' rather than 'the right'."

In *Campbell v The Queen* Lord Mance similarly explained that section 110(3) is carefully framed to preserve, rather than grant, jurisdiction.

41. In the opinion of the Board those Jamaican authorities confirm that the purpose of section 81(5) of the Constitution of Mauritius was to make it clear that nothing in section 81 was intended to abrogate or modify the power of the Judicial Committee to grant special leave. However it is equally clear that section 81(5) does not positively confer jurisdiction on the Judicial Committee to give special leave, nor does it prevent other provisions of the Mauritius Constitution or Mauritian law from limiting or abrogating the Judicial Committee's power to grant special leave.

42. It is therefore necessary to look elsewhere in order to determine whether or not the Board has power to grant special leave. The important question is whether there is any other legislation or Constitutional provision that expressly or by "necessarily intendment" restricts the Judicial Committee's power to grant special leave in this case.

43. The other provisions which are of particular relevance for present purposes are section 81(3), paragraph 4, especially 4(3) and (4), of the First Schedule and section 37, especially section 37(6), of the Constitution. The First Schedule and section 81 are annexed to this judgment and the Board has already summarised the provisions of particular relevance above.

44. In particular, section 81(3) of the Constitution expressly provides that subsection (1) (appeal to the Judicial Committee as of right) and subsection (2) (appeal to the Judicial Committee with leave from the Supreme Court) are subject to paragraph 4(4) of the First Schedule, which provides that, where a returning officer decides that a nomination is invalid, his decision may be questioned upon an application to a judge of the Supreme Court and that the determination of the Judge shall not be subject to appeal. By contrast, where the returning officer decides that a nomination is valid, a challenge to the Supreme Court may only be brought by proceedings under section 37, which by section 37(6) provides that a determination by a judge under that section shall not be subject to appeal and, although it contains a proviso that an appeal shall lie to the Judicial Committee in such circumstances as may be prescribed by Parliament, no such circumstances have been prescribed. The natural inference is that in such a case, absent such prescription, it was intended under the Constitution that there should be no appeal to the Judicial Committee of any kind, including by way of special leave.

45. The same inference cannot be drawn directly in the case of a determination that the declarations were invalid because there is no equivalent of the proviso to section 37(6) in paragraph 4(4). On the other hand, it would be very odd if an appeal by special leave were available against a decision that the declarations were invalid but not where they were valid. The Board would expect the position to be the same in both cases and, indeed, in the further case where the challenge is to a determination of the correctness of a nomination under paragraph 3(2). In that case the determination cannot be subject to an appeal by reason of the prohibition in paragraph 3(2), which in this respect is in the same terms as paragraph 4(4).

46. The inclusion of the proviso in section 37(6) suggests that the draftsman of the Constitution may have thought that there might be some reason why it would be appropriate to permit an appeal to the Judicial Committee in a case where the issue was whether a person had been validly elected as a member of Parliament. He therefore left it to Parliament to decide that question in the future. By contrast, the absence of any such provision in paragraph 3(2) or 4(4) supports the conclusion that he intended that it should not be possible to appeal to the Judicial Committee in such cases, whether under section 81(1)(a) or (b) or (2) or by special leave. This seems to the Board to be confirmed by the fact that section 81(3) provides that section 81(1) and (2) are subject to both section 37(6) and paragraphs 3(2) and 4(4). In short paragraphs 3(2) and 4(4) are finality provisions which would be deprived of much of their effect if appeals to the Judicial Committee were permitted. Section 37(6) is also a finality provision but subject to Parliament subsequently permitting an appeal to the Judicial Committee.

47. The policy reason behind all these provisions seems to the Board to be clear. It is to permit one challenge to a decision of the returning officer or to the correctness of a declaration, all within a tight time scale, in order to ensure that the determination is made before the election, but to prohibit appeals with the inevitable delays consequent upon them, so that the election can proceed without delay in the light of whatever decision is reached by the court. This seems to the Board to be an entirely understandable policy.

48. Similar considerations have been taken into account by the Judicial Committee in election cases in the past. For example in *Strickland v Grima* [1930] AC 285 it gave provisional leave in order to hear full argument on whether special leave ought to be granted in a case from Malta. Clause 33 of the Maltese Constitution Letters Patent provided:

> "All questions which may arise as to the right of any person to be or remain a member of the Senate or the Legislative Assembly shall be referred to and decided by Our Court of Appeal in Malta."

49. The Board held that the clear intention was that the Court of Appeal in Malta would have the first and only say on those matters with no further appeal to the Privy Council. The Court of Appeal had held that the election of two members to the senate had been null and void. Giving the judgment of the Board, Lord Blanesburgh said at p 296 that the jurisdiction in such a case was extremely special and

> "of a character that ought, as soon as possible, to become conclusive, in order that the constitution of the assembly may be distinctly and speedily known."

50. A similar result was reached in *Senanayake v Navaratne* [1954] AC 640, where it was held that the finality clause applied even to jurisdictional challenges. Both *Strickland* and *Senanayake* were distinguished in *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31, but no doubt was expressed on the underlying approach. On the contrary, giving the judgment of the Board, Lord Upjohn referred (at p 40E) to what he called a long line of decisions starting with *Théberge v Laudry* (1876) 2 App Cas 102 and ending with *Arzu v Arthur* [1965] I WLR 675. He added that the underlying reason for this line of decisions was, as the authorities show, "the recognition of the necessity for a speedy determination of an election issue". None of the cases is on all fours with this case but they do seem to the Board to point the way.

51. In all the circumstances the Board has concluded that the Constitution provides, if not expressly, then by necessary intendment, that the Judicial Committee has no jurisdiction to give special leave to appeal from a determination by the Supreme Court under paragraph 4(4) of the First Schedule.

52. In reaching that conclusion the Board is aware that the contrary view was expressed in *Narrain v Electoral Suprevisory Commission* (2006) SCJ 214. That was an application in which the Supreme Court, comprising Pillay CJ and Matadeen and Lam Shang Leen JJ were asked to overturn the previous decision of the Full Bench in *Electoral Supervisory Commission v Attorney General*, which had overruled the decision of Balancy J in the first *Narrain* case. The procedure used was "tierce opposition" (a process whereby an individual can ask the court to reconsider a decision in a case in which they were not a party but which causes him hardship or prejudice). The court in the second *Narrain* case held that the challenge could not succeed because the action ought to have been brought by way of plaint and summons under the civil procedure rules. It also observed that such a procedure

> "…might not apply in constitutional matters since special provision has been made to deal with those matters".

The Court thought however that it would be open to a candidate who had his nomination refused to apply directly to the Judicial Committee for special leave "…in spite of the fact that such a determination is not subject to an appeal". If by that the Court meant that a decision of the Supreme Court made under paragraph 4(4) of the First Schedule could be challenged by obtaining special leave to appeal to the Judicial Committee, the Board respectfully disagrees for the reasons it has given above.

53. It follows that the Judicial Committee does not have jurisdiction to grant special leave and must therefore refuse the application.

Would special leave have been granted?

54. In the light of the Board's decision on jurisdiction, the question whether to grant special leave does not arise. However, the question was fully argued and the Board will briefly state its conclusion, which is that, on the assumption that the Judicial Committee has jurisdiction to grant special leave, such leave should not, and therefore would not, be granted.

55. The considerations set out above which emphasise the importance of the speedy resolution of issues relating to the alleged invalidity of a candidate's nomination for election form a strong basis for the Board refusing to exercise any discretion to grant special leave to challenge the decision of the judge that the decisions of the returning officers that the nominations were invalid were correct. In these circumstances, the Board would only exercise its jurisdiction to grant special leave in a special, even exceptional, case.

56. No such circumstances exist here. The true complaint that the applicants have is that the best loser system is wrong in principle and should be abolished. There may be strong grounds for advancing such a contention. It is said on behalf of the respondents that the debate is a political debate and that there is no basis for mounting a legal challenge to the system. They say that the applicants have dressed up what is in reality a challenge to the provisions of the First Schedule to the Constitution as a challenge to the legality of the Regulations and that it is not open to the courts to strike down any part of the Constitution, which can only be altered in accordance with the provisions of section 47 referred to above. The applicants reply is that they are not challenging any provision of the Constitution but only the Regulations.

57. Whichever of those submissions is correct, for essentially two reasons the Board is of the opinion that special leave should not be granted to challenge the decision of the judge. The first reason is that it is not necessary to permit such a challenge in order to enable the applicants to raise the constitutional issues which they wish to advance. As explained above, it is common ground that they can raise the

issues by making an appropriate application to the Supreme Court from which there is an avenue of appeal to the Judicial Committee. It was accepted on behalf of the respondents that neither the failure of the applicants' case before the judge nor the failure of this application for special leave to appeal against her decision will prevent a constitutional challenge being advanced in the future. There is no need for such a challenge to be permitted by way of appeal from the decision of the judge because, as the applicants themselves recognise, it is now too late to challenge the election of those elected as long ago as May 2010.

58. The second reason for not granting special leave is that, in the opinion of the Board, it is of the utmost importance that, save perhaps in an exceptional case, the Judicial Committee should not pronounce upon what are or may issues of considerable constitutional importance without having the benefit of the opinion of the Supreme Court or the Court of Appeal upon them. Those courts have much greater familiarity with the history and development of the voting system in Mauritius and, so far as they may be relevant, with both issues of policy and the political realities in Mauritius today. They are in a far better position than the Board, at any rate in the first instance, to grapple with such issues and to identify which issues are in truth issues of law and which are issues of policy.

59. At one stage in the course of the argument and its subsequent deliberations the Board considered whether, if it had jurisdiction, it would take the case on the basis that the applicants' case from the outset had been a constitutional challenge and that the respondents had every opportunity to put whatever material they wished before the Board. However, on reflection, it has concluded that that would not be the correct approach because of the importance of the constitutional issues being considered and adjudicated upon in the first instance in Mauritius.

60. For these reasons, the Board has concluded that, if the Judicial Committee had jurisdiction to grant special leave against the decision of the judge, it would not exercise it.

The merits

61. It follows from the conclusions expressed so far that it would not be appropriate for the Board to express concluded views upon the merits. If the matter were ever to return to the Judicial Committee in the future, it would only be after all parties had had the opportunity to put evidence before the Supreme Court in Mauritius and after Supreme Court and the Court of Appeal had had an opportunity of reaching their own conclusions. In these circumstances the Board will only say this.

62. It has been plain to the Board from the argument that the question whether the best loser system should be retained has given rise to much political and perhaps legal debate over the years. It is now some years since Seetulsingh J said that he understood that a project of electoral reform was on the cards. The Board was told much the same. It is perhaps obvious that it would be much better for these issues to be decided as a result of political debate and, if necessary, constitutional reform than through the courts.

63. There is undoubted force in the submissions made on behalf of the respondents that the applicants' real concern is not with the Regulations but with the best loser system set out in the First Schedule. The Board well understands the applicants' concerns, especially for example the amendment to paragraph 5(8) of the First Schedule which introduced a reference to the 1972 census as the basis of an important part of the calculation necessary to operate the system: see Annex A, First Schedule, paragraph 5(8), note 1 below. It is said that a system based on figures now nearly forty years old makes no sense. However, whatever the merits of the opposing arguments~~,~~ the Board is unable to express a view upon them now.

64. The Board understands that the applicants wish to say that their existing constitutional rights have been infringed but does not think it right to reach any firm conclusions on the merits. It appreciates that, if the issues cannot be resolved politically, they may be raised before the Judicial Committee in the future.

CONCLUSION

65. For the reasons given above, the Board concludes that the Judicial Committee has no jurisdiction to grant special leave to appeal from the decision of the judge dismissing the applicants' challenge to the returning officers' decisions that the nominations were invalid for failure, in each case, by the proposed candidate to make a declaration as to community. It follows that the applications are refused. If it had held that the Judicial Committee had jurisdiction, the Board would not have granted special leave. It remains open to the applicants to advance a constitutional challenge in the future. The Board expresses no concluded views as to the merits of any such challenge, especially since it will be based on evidence put before the Supreme Court or Court of Appeal and the Judicial Committee will then have the benefit of the views of the courts in Mauritius.

66. Parties to submit applications in writing for costs within 28 days.

ANNEX A

FIRST SCHEDULE (section 31(2))

1. Elected members to be returned by constituencies

(1) There shall be 62 seats in the Assembly for members representing constituencies and accordingly each constituency shall return 3 members to the Assembly in such manner as may be prescribed, except Rodrigues, which shall so return 2 members.

(2) Every member returned by a constituency shall be directly elected in accordance with this Constitution at a general election or by-election held in such manner as may be prescribed.

(3) Every vote cast by an elector at any election shall be given by means of a ballot which, except in so far as may be otherwise prescribed in relation to the casting of votes by electors who are incapacitated by blindness or other physical cause or unable to read or understand any symbols on the ballot paper, shall be taken so as not to disclose how any vote is cast; and no vote cast by any elector at any general election shall be counted unless he cast valid votes for 3 candidates in the constituency in which he is registered or, in the case of an elector registered in Rodrigues, for 2 candidates in that constituency.

2. Registration of parties

(1) Every political party in Mauritius, being a lawful association, may, within 14 days before the day appointed for the nomination of candidates for election at any general election of members of the Assembly, be registered as a party for the purposes of that general election and paragraph 5(7) by the Electoral Supervisory Commission upon making application in such manner as may be prescribed:

Provided that any 2 or more political parties may be registered as a party alliance for those purposes, in which case they shall be regarded as a single party for those purposes; and this Schedule shall be construed accordingly.

(2) Every candidate for election at any general election may at his nomination declare in such manner as may be prescribed that he belongs to a party that is registered as such for the purpose of that general election and, if he does so, he shall be regarded as a member of that party for those purposes, while if he does not do so, he shall not be regarded as a member of any party for those purposes; and where any candidate is regarded as a member of a party for those purposes, the name of that party shall be stated on any ballot paper prepared for those purposes upon which his name appears.

(3) Where any party is registered under this paragraph, the Electoral Supervisory Commission shall from time to time be furnished in such manner as may be prescribed with the names of at least 2 persons, any one of whom is authorised to discharge the functions of leader of that party for the purposes of the proviso to paragraph 5(7).

(4) There shall be such provision as may be prescribed requiring persons who make applications or declarations for the purposes of this paragraph to furnish evidence with respect to the matters stated in such applications or declarations and to their authority to make such applications or declarations.

(5) There shall be such provision as may be prescribed for the determination, by a Judge of the Supreme Court before the day appointed for the nomination of candidates at a general election, of any question incidental to any such application or declaration made in relation to that general election, and the determination of the Judge shall not be subject to appeal.

3. Communities

(1) Every candidate for election at any general election of members of the Assembly shall declare in such manner as may be prescribed which community he belongs to and that community shall be stated in a published notice of his nomination.

(2) Within 7 days of the nomination of any candidate at an election, an application may be made by an elector in such manner as may be prescribed to the Supreme Court to resolve any question as to the correctness of the declaration relating to his community made by that candidate in connection with his nomination, in which case the application shall (unless withdrawn) be heard and determined by a Judge of the Supreme Court, in such manner as may be prescribed, within 14 days of the nomination, and the determination of the Judge shall not be subject to appeal.

(3) For the purposes of this Schedule, each candidate at an election shall be regarded as belonging to the community to which he declared he belonged at his nomination as such, or if the Supreme Court has held in proceedings questioning the correctness of his declaration that he belongs to another community, to that other community, but the community to which any candidate belongs for those purposes shall not be stated upon any ballot paper prepared for those purposes.

(4) For the purposes of this Schedule, the population of Mauritius shall be regarded as including a Hindu community, a Muslim community and a Sino-Mauritian community; and every person who does not appear, from his way of life, to belong to one or other of those 3 communities shall be regarded as belonging to the General Population, which shall itself be regarded as a fourth community.

4. Provisions with respect to nominations

(1) Where it is so prescribed, every candidate for election as a member of the Assembly shall in connection with his nomination make a declaration in such manner as may be prescribed concerning his qualifications for election as such.

(2) There shall be such provision as may be prescribed for the determination by a returning officer of questions concerning the validity of any nomination of a candidate for election as a member of the Assembly.

(3) Where a returning officer decides that a nomination is valid, his decision shall not be questioned in any proceedings other than proceedings under section 37.

(4) Where a returning officer decides that a nomination is invalid, his decision may be questioned upon an application to a Judge of the Supreme Court made within such time and in such manner as may be prescribed, and the determination of the Judge shall not be subject to appeal.

5. Allocation of 8 additional seats

(1) In order to ensure a fair and adequate representation of each community, there shall be 8 seats in the Assembly, additional to the 62 seats for members representing constituencies, which shall so far as is possible be allocated to persons belonging to parties who have stood as candidates for election as members at the general election but have not been returned as members to represent constituencies.

(2) As soon as is practicable after all the returns have been made of persons elected at any general election as members to represent constituencies, the 8 additional seats shall be allocated in accordance with the following provisions of this paragraph by the Electoral Supervisory Commission which shall so far as is possible make a separate determination in respect of each seat to ascertain the appropriate unreturned candidate (if any) to fill that seat.

(3) The first 4 of the 8 seats shall so far as is possible each be allocated to the most successful unreturned candidate, if any, who is a member of a party and who belongs to the appropriate community, regardless of which party he belongs to.

(4) When the first 4 seats (or as many as possible of those seats) have been allocated, the number of such seats that have been allocated to persons who belong to parties, other than the most successful party, shall be ascertained and so far as is possible that number of seats out of the second 4 seats shall one by one be allocated to the most successful unreturned candidates (if any) belonging both to the most

successful party and to the appropriate community or where there is no unreturned candidate of the appropriate community, to the most successful unreturned candidates belonging to the most successful party, irrespective of community.

(5) In the event that any of the 8 seats remains unfilled, then the following procedure shall so far as is possible be followed until all (or as many as possible) of the 8 seats are filled, that is to say, one seat shall be allocated to the most successful unreturned candidate (if any) belonging both to the most successful of the parties that have not received any of the 8 seats and to the appropriate community, the next seat (if any) shall be allocated to the most successful unreturned candidate (if any) belonging both to the second most successful of those parties and to the appropriate community, and so on as respects any remaining seats and any remaining parties that have not received any of the 8 seats.

(6) In the event that any of the 8 seats still remains unfilled, then the following procedure shall so far as is possible be followed (and, if necessary, repeated) until all (or as many as possible) of the 8 seats are filled, that is to say, one seat shall be allocated to the most successful unreturned candidate (if any) belonging both to the second most successful party and to the appropriate community, the next seat (if any) shall be allocated to the most successful unreturned candidate (if any) belonging both to the third most successful party (if any) and to the appropriate community, and so on as respects any remaining seats and parties.

(7) Where at any time before the next dissolution of Parliament one of the 8 seats falls vacant, the seat shall as soon as is reasonably practicable after the occurrence of the vacancy be allocated by the Electoral Supervisory Commission to the most successful unreturned candidate (if any) available who belongs to the appropriate community and to the party to whom the person to whom the seat was allocated at the last general election belonged:

Provided that, where no candidate of the appropriate community who belongs to that party is available, the seat shall be allocated to the most successful unreturned candidate available who belongs to the appropriate community and who belongs to such other party as is designated by the leader of the party with no available candidate.

(8) The appropriate community means, in relation to the allocation of any of the 8 seats, the community that has an unreturned candidate available (being a person of the appropriate party, where the seat is one of the second 4 seats) and that would have the highest number of persons (as determined by reference to the results of the published 1972[1] official census of the whole population of Mauritius) in relation to the number of seats in the Assembly held immediately before the allocation of the seat by persons belonging to that community (whether as members elected to represent constituencies or otherwise), where the seat was also held by a person belonging to that community:

[1] The words ‘published 1972’ replaced ‘latest published’ by amendment 2/82 because identity of community was no longer required in any census after 1972.

Provided that, if, in relation to the allocation of any seat, 2 or more communities have the same number of persons as aforesaid preference shall be given to the community with an unreturned candidate who was more successful than the unreturned candidates of the other community or communities (that candidate and those other candidates being persons of the appropriate party, where the seat is one of the second 4 seats).

(9) The degree of success of a party shall, for the purposes of allocating any of the 8 seats at any general election of members of the Assembly, be assessed by reference to the number of candidates belonging to that party returned as members to represent constituencies at that election as compared with the respective numbers of candidates of other parties so returned, no account being taken of a party that had no candidates so returned or of any change in the membership of the Assembly occurring because the seat of a member so returned becomes vacant for any cause, and the degree of success of an unreturned candidate of a particular community (or of a particular party and community) at any general election shall be assessed by comparing the percentage of all the valid votes cast in the constituency in which he stood for election secured by him at that election with the percentages of all the valid votes cast in the respective constituencies in which they stood for election so secured by other unreturned candidates of that particular community (or as the case may be, of that particular party and that particular community), no account being taken of the percentage of votes secured by any unreturned candidate who has already been allocated one of the 8 seats at that election or by any unreturned candidate who is not a member of a party:

Provided that if, in relation to the allocation of any seat, any 2 or more parties have the same number of candidates returned as members elected to represent constituencies, preference shall be given to the party with an appropriate unreturned candidate who was more successful than the appropriate unreturned candidate or candidates of the other party or parties.

(10) Any number required for the purpose of subparagraph (8) or any percentage required for the purposes of subparagraph (9) shall be calculated to not more than 3 places of decimals where it cannot be expressed as a whole number.

[Amended 2/82; 36/82; 48/91]

ANNEX B

81. Appeals to the Judicial Committee

(1) An appeal shall lie from decisions of the Court of Appeal or the Supreme Court to the Judicial Committee as of right in the following cases –

(a) final decisions, in any civil or criminal proceedings, on questions as to the interpretation of this Constitution;

(b) where the matter in dispute on the appeal to the Judicial Committee is of the value of 10,000 rupees or upwards or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value of 10,000 rupees or upwards, final decisions in any civil proceedings;

(c) final decisions in proceedings under section 17; and

(d) in such other cases as may be prescribed by Parliament:

Provided that no such appeal shall lie from decisions of the Supreme Court in any case in which an appeal lies as of right from the Supreme Court to the Court of Appeal.

(2) An appeal shall lie from decisions of the Court of Appeal or of the Supreme Court to the Judicial Committee with the leave of the Court in the following cases –

(a) where in the opinion of the Court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to the Judicial Committee, final decisions in any civil proceedings; and

(b) in such other cases as may be prescribed by Parliament:

Provided that no such appeal shall lie from decisions of the Supreme Court in any case in which an appeal lies to the Court of Appeal, either as of right or by the leave of the Court of Appeal.

(3) Subsections (1) and (2) shall be subject to section 37(6) and paragraphs 2(5), 3(2) and 4(4) of the First Schedule.

(4) In this section, the references to final decisions of a court do not include any determination of a court that any application made to it is merely frivolous or vexatious.

(5) Nothing in this section shall affect any right of the Judicial Committee to grant special leave to appeal from the decision of any court in any civil or criminal matter.

[Amended 48/91]