

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2014/0644

**IN THE MATTER OF SECTION 68 (1) SECTION 69 (3) AND SECTION 70 OF THE ANTIGUA AND
BARBUDA CONSTITUTION ORDER 1981**

BETWEEN:

GEORGE RICK JAMES

(In person and as Secretary of the Free and Fair Election League Inc.)

Claimant

And

HONOURABLE GASTON BROWNE

(Prime Minister of Antigua and Barbuda)

First Defendant

And

HONOURABLE STEADROY BENJAMIN

(Attorney General of Antigua and Barbuda)

Second Defendant

Appearances:

Mr. Ralph Francis for the Claimant

Ms. Alicia Aska and Mrs. Carla Brooks-Harris for the Defendants

2016: July 22

JUDGEMENT

- [1] **HENRY, J.** : By Claim Form filed on the 8th December 2014, the claimant seeks the following declarations:
- 1) That the first defendant has exceeded his authority under section 69(3) of the Antigua and Barbuda Constitution Order 1981 by appointing eleven (11) elected members of the House to serve as Cabinet Ministers and hereby has created an executive body that enjoys supremacy over the Legislative Branch of Government;
 - 2) That the appointments contravene section 70 of the Antigua and Barbuda Constitution Order 1981.
- [2] The Free and Fair Election League Inc. (FFEL) is a non-profit organization incorporated under the Laws of Antigua and Barbuda. George Rick James brings the action in his personal capacity as well as in his capacity as the Secretary of the FFEL. The first defendant is the leader of the Antigua and Barbuda Labour Party and the Prime Minister. The second defendant is the Attorney General.
- [3] The following basic facts stated by the claimant have not been disputed by the defendants. On 12th June 2014, there was a general election in Antigua and Barbuda the result of which the party led by the first defendant won fourteen (14) seats against three (3) seats won by the United Progressive Party to the seventeen (17) member House of Representatives. In accordance with section 69 (1) and (2) of the Constitution, the first defendant was duly appointed to hold the office of Prime Minister. The second defendant was appointed as Attorney General and Minister of Legal Affairs. On 16th June 2014, the first defendant appointed eleven (11) of the other elected members to the House of Representatives to be Ministers of the Government and members of his Cabinet. This has resulted in a Cabinet comprised of 13 of the 17 Members of the House.
- [4] The claimant alleges that the first defendant has exceeded his authority under Section 69 (3) of the Constitution in appointing eleven (11) of the elected members of the House to serve in his Cabinet, thus placing the Cabinet in a position of supremacy over the Parliament. Further, that the appointment of the eleven also contravenes section 70 of the Constitution. The breach of section 70 of the Constitution has allowed the first defendant the ability to use his power as Prime Minister together with an oversized cabinet to by-pass Parliament.
- [5] The defendants do not accept there has been a breach of either section 69(3) or section 70 of the Constitution. They state that the first defendant acted in accordance with section 70 of the Constitution, which is very clear with respect to the setting up of the Cabinet. It gives the Prime Minister the discretion to create his Cabinet as he considers appropriate. They refer the court specifically to the provisions of section 70(2). They further point out that the Parliament consists of both the House of Representatives and the Senate and that laws cannot be passed or amended unless it is passed by both Houses of Parliament and the Governor General.

Submissions

- [6] The claimant submits that the essence of his claim is that the provision under section 70(1) that there shall be a Cabinet which shall be collectively responsible to Parliament directly impacts on the number of persons who may be appointed as Cabinet members. According to Counsel, the Constitution presents the concept of a Parliament which is not reflected in practice. The concept requires a Parliament which controls and supervises the Executive, that is, the Prime Minister and Cabinet. However, what we have is a Parliament which is entirely dominated and manipulated by the Prime Minister and Cabinet.
- [7] Counsel admits that Parliament has not passed any law as it pertains to the number of ministries which may be established. However, he submits that the failure of Parliament to act does not grant to the Prime Minister the unfettered discretion to appoint such number of Cabinet Ministers as he pleases. His discretion, Counsel asserts, is always circumscribed by the requirement of the Constitution that "there shall be a Cabinet . . . which shall have the general direction and control of the Government and shall be collectively responsible therefor to Parliament". Due to the fact that thirteen of the seventeen (17) elected Parliamentary representatives are members of the Cabinet, the Cabinet has been elevated to a position where it enjoys supremacy over the Parliament to which it is to be collectively responsible.
- [8] He further submits that the second defendant has misconstrued the intention of the Constitution. Specifically as it relates to the discretion of the Prime Minister to create his Cabinet as he considers appropriate. The second defendant has ignored the fact that the discretion granted to the Prime Minister under section 70 of the Constitution is subject to the mandate given to Parliament under section 69(3). Counsel therefore asks that the declarations sought be granted.
- [9] Counsel for the defendants submit that the claimant has failed to produce any evidence which proves that the first defendant has exceeded his authority under section 69(3) of the Constitution or violated the provisions of the section in any way. Counsel submits that Parliament is not comprised of only Cabinet Ministers but also of the Lower House, including back benchers and opposition members along with the Upper House (the Senate).

Issues

- [10] The issue for the court's determination is whether the appointment of 11 members of the House of Representative as members of Cabinet contravenes sections 69 (3) and 70 of the Constitution.

The Law

- [11] Sections 69 (3), (4) and 70(1) and (2) of the Constitution state as follows:
- 69 (3) Subject to the provision of section 82 of this Constitution and subsection (4) of this section there shall be, in addition to the office of Prime Minister, such other offices of Minister (including Minister of State) of the Government as may be established by Parliament or, subject to the provisions of any law enacted by Parliament, by the Governor-General, acting in accordance with the advice of the Prime Minister.

(4) The Ministers other than the Prime Minister shall be such persons as the Governor-General, acting in accordance with the advice of the Prime Minister, shall appoint from among the members of the House and of the Senate.

70. (1) There shall be a Cabinet for Antigua and Barbuda which shall have the general direction and control of the Government and shall be collectively responsible therefor to Parliament.

(2) The Cabinet shall consist of the Prime Minister and such number of other Ministers (of whom one shall be the Attorney-General), appointed in accordance with the provisions of section 69 of this Constitution as the Prime Minister may consider appropriate.

[12] The resolution of the issues raised involves the interpretation of the relevant sections of the Constitution. Byron, C.J in **Attorney General of Grenada v The Grenada Bar Association**¹ stated the approach in these terms:

"The nature of a Constitution requires that a broad, generous and purposive approach be adopted to ensure that its interpretation reflects the deeper inspiration and aspiration of the basic concepts on which the Constitution is founded. Respect must be paid to the language that is used and its context, by considering all relevant provisions bearing on the subject for interpretation as a whole, and to the traditions and usages which have given meaning to that language, in order to effect the objective of the Constitution. In order to do this the court must have a sober and objective appraisal of the general canvas upon which the details of the constitutional picture are painted."

[13] Like many of the other Commonwealth Caribbean Countries, Antigua and Barbuda has a Constitution which has adopted the Westminster model of government. It provides for three distinct branches of government: the Legislature, the Executive and the Judiciary.

[14] Part IV of the Constitution deals with the Parliament. Section 27 establishes the Parliament and provides that it shall consist of Her Majesty, a Senate and a House of Representatives. The Senate consists of seventeen persons who have been appointed in accordance with section 28 and such temporary members (if any) as may be appointed in accordance with section 32. Section 33 makes provision for a President and Vice President of the Senate. The House of Representatives consist of a number of elected members equal to the number of constituencies. Currently there are seventeen (17) constituencies. Section 42 also makes provision for the election of a Speaker and Deputy Speaker of the House.

[15] Parliament may make laws for the peace, order and good government of the country and may alter any of the provisions of the Constitution or of the Supreme Court Order in the manner specified in section 47. Parliament enjoys legislative supremacy in that there are no legal limitations on the legislative competency of Parliament. Parliament's legislative power is exercised by bills passed

¹ Civil Appeal No. 8 of 1999

by the Senate and the House (or by the House in the cases mentioned in sections 54 and 55) and assented to by the Governor-General on behalf of Her Majesty.

The Executive

- [16] The Constitution provides that the executive authority is vested in Her Majesty and may be exercised on her behalf by the Governor-General. In addition to the office of Prime Minister, provision is made in section 69 (3) for such other offices of Minister of the Government as may be established by Parliament or, by the Governor-General, acting in accordance with the advice of the Prime Minister. The Ministers (other than the Prime Minister) are persons appointed from among the members of the House and the Senate.
- [17] Section 70 (1) places the general direction and control of the Government under the purview of the Cabinet. Section 70 (2) provides that the Cabinet shall consist of the Prime Minister and such number of other Ministers (of whom one shall be the Attorney General), appointed in accordance with the provisions of section 69 of this Constitution as the Prime Minister may consider appropriate.
- [18] The section dealing with the composition of the Cabinet is critical. Two aspects of this provision are evident: firstly, in addition to the Prime Minister and the Attorney General, constitutionally Cabinet can only consist of government Ministers who are either Senators or members of the House; and secondly no maximum number is prescribed by the section. The discretion is expressly given to the Prime Minister as to the size of his Cabinet. Instead, under section 69(3), provision is made for Parliament by law or the Governor-General by Statutory Instrument to establish the number of Ministers of Government. This would impact the size of Cabinet. However, no such action has been undertaken.
- [19] So the picture that emerges from these constitutional provisions is not one of total separation of the functions and personnel between the Executive and the Legislative branches. Government Ministers who are a part of the legislature hold responsibility for the conduct of government business and may also be members of Cabinet. This is by constitutional design.

Collective Responsibility and its Impact

- [20] Having placed the general direction and control of the Government under the purview of the Cabinet, section 70(1) provides that it "shall be collectively responsible therefor to Parliament".
- [21] A.W. Bradley and K.D. Ewing in their text Constitutional and Administrative Law traced the development of responsibility to Parliament. They note that by the 19th Century, ministerial responsibility was the accepted basis of parliamentary government in Britain. After experimenting with appointed public boards that were not directly responsible to Parliament and might have no one in Parliament to defend them against their critics, a strong political preference was expressed for vesting the new powers in a minister who sat in Parliament and could account to Parliament for what was done. The development of parliamentary procedures for financial scrutiny and for

obtaining information through questions addressed to ministers enabled members to influence matters within the minister's responsibility.

[22] It is the continuance and preservation of this British democratic system of party government, in which the members of the executive or cabinet are members of the legislature, and are answerable to it, that the provisions in Caribbean constitutions seek to guarantee².

[23] The authors of Halsbury Laws of England³, explain collective responsibility in these words:

"Each administration is collectively responsible to Parliament for its conduct of government. The three elements of this convention are the requirement of unanimity, confidentiality and confidence.

In order to preserve the dignity of the nation and the necessary appearance of unanimity which should be displayed by an efficient administration, with regard both to the advice given to the monarch in administrative and executive matters, and to legislative measures in Parliament upon all questions which have not been left open, it is recognised as being constitutionally necessary that individual ministers should in general support the decisions arrived at by the Cabinet."

[24] The late Sir Allen Lewis noted in his Essay, "The Separation of Powers – its relevance for Parliamentary Government in the Caribbean"⁴:

"Members of the Legislature must insist upon ministerial accountability to Parliament: must utilise fully and improve existing mechanisms for scrutinising the wealth of rules and order through which approved policies are given legislative sanctions, and for monitoring of their administration. In particular, scrutiny by select committees should be directed to ensuring that administrative legislation does not exceed the terms of its authority, e.g. by imposing unauthorised taxation or unauthorised charges on the public revenue; or make some unusual or unexpected use of the powers conferred; and to examination of provisions which exclude challenge of departmental decisions in the law courts."

[25] This is the face of accountability at work. It does not require any numerical equation for the Cabinet to operate in accordance with section 70(1). It is for the Parliament to take the type of affirmative action described above. There is no evidence before the court that the present Parliament is not doing so.

[26] The claimant's affidavit in support, which is the only evidence before the court, consists of 10 short paragraphs. The first three deals with the claimant and the work of FFEL. The fourth paragraph

² Sir Allen Lewis, "The Separation of Powers – its relevance for Parliamentary Government in the Caribbean", The West Indian Law Journal, October 1978

³ Constitutional Law, Volume 8 paragraph 417

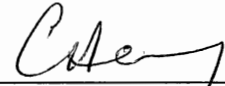
⁴ The West Indian Law Journal, October 1978

describes the first defendant. Paragraphs 5 through 7 sets out the results of the 2014 election and the appointments made in its wake. Paragraph 8 alleges that the number of Ministers appointed contravenes section 70 of the Constitution and sets out the relevant part of section 70. The paragraph then concludes by stating "The House of Representatives is comprised of seventeen (17) elected members. Due to the fact that thirteen (13) of the seventeen elected representatives are members of the Cabinet, I verily believe that the Cabinet enjoys a position of supremacy over the Parliament to which it is to be "responsible". Paragraph 9 then states that the breach of section 70 of the Constitution has allowed the first defendant the ability to use his power as Prime Minister together with an oversized cabinet to by-pass Parliament. The paragraph then refers to an exhibit comprising the list of Cabinet Members and their portfolios. It concludes with the statement that each of them was administered the Oath of Secrecy. The last paragraph consists of one sentence which states that "If this irregularity is permitted to continue, it could open the way for the existence of an unaccountable and undemocratic one party State." This is the sum total of the evidence before the court.

- [27] Notwithstanding, Counsel for the claimant endorses the views expressed by C.O.R. Phillips Q.C., in his Essay⁵, where he points out that a Minister who is a member of Cabinet is bound by the doctrine of collective responsibility not to reveal to the public what position he took during the discussion of any Cabinet decision and, he is obliged to publicly support the decision whether or not he thinks it wrong or did not support it in Cabinet. Mr. Phillips describes the impact on the House when he concludes that the House is "hamstrung" being comprised mainly of Ministers who are unable to voice their real opinion on any measure brought before Parliament. Further, that the Cabinet has been elevated to a position of ascendancy and control over the *House*.
- [28] I emphasize that Parliament does not refer to the two houses of Parliament individually, for neither house has the authority to legislate on its own. Approval of a Bill normally requires the approval of the Senate and the House and the assent of the Governor-General on behalf of Her Majesty. Further, the framers of the Constitution were fully aware of the doctrine of collective responsibility. It dates back to at least the early 19th century. Yet, the framers of the Constitution chose to put in place a system of Government where (a) Cabinet members are chosen from among the members of Parliament; (b) there is an absence of any prescribed maximum number for the size of the Cabinet and (c) it is expressly directed that the Cabinet consist of such number of other Ministers "as the Prime Minister may consider appropriate". In the absence of any law or statutory instrument enacted pursuant to section 69 (3), it cannot be said that the appointment of 11 members of the House as Ministers of Government and their inclusion in the Cabinet, so as to create a 13 member Cabinet, constitutes a violation of sections 69 (3) and 70 of the Constitution.

⁵C.O. R Phillips QC "The Rape of The Constitution" dated the 25th April, 1994

- [29] On the record before the court, the claimant has not shown that the first defendant has violated section 70(1) or section 69 (3) of the Constitution.
- [30] Accordingly, the declarations sought are refused. No order for cost.



CLARE HENRY
High Court Judge
Antigua & Barbuda