JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 45 & 47/2008

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

C.A. 45/2008

BETWEEN	**ABRAHAM DABDOUB**	**APPELLANT**
AND	**DARYL VAZ**	**1ST RESPONDENT**
AND	**CARLTON HARRIS**	**2ND RESPONDENT**
AND	**THE ATTORNEY-GENERAL OF JAMAICA**	**3RD RESPONDENT**

A N D

C.A. 47/2008

BETWEEN	**DARYL VAZ**	**APPELLANT**
AND	**ABRAHAM DABDOUB**	**RESPONDENT**

Gayle Nelson, Jalil Dabdoub and Winston Taylor, instructed by Gayle Nelson and Co. for Abraham Dabdoub

Ransford Braham and Mrs. Suzanne Risden-Foster, instructed by Livingston, Alexander & Levy for Daryl Vaz

Ms. Danielle Archer, instructed by Director of State Proceedings, for the 2nd and 3rd respondents

November 27, 28; December 1, 2, 3, 2008;
February 27 & March 13 2009

PANTON, P.

1. These consolidated appeals are from a decision of McCalla, C.J. in respect of a challenge by Mr. Abraham Dabdoub concerning the right of Mr. Daryl Vaz to sit in the House of Representatives, the latter having been elected on the 3rd September, 2007, Member of the House of Representatives for the constituency of West Portland. The learned Chief Justice found that Mr. Vaz was not qualified to be elected to the House. However, she found that Mr. Dabdoub was not entitled to be returned as the duly elected Member. In the circumstances, she made no order as to costs in respect of both candidates as against each other, and ordered Mr. Dabdoub to pay the costs of the returning officer and the Attorney-General.

On February 27, 2009, we made the following Orders:

C.A. 45/2008

Appeal dismissed, save that the order for costs made below is set aside; and substituted therefor is an order that the appellant Dabdoub is to have the costs of those proceedings as against the respondent Vaz. There is no order as to costs in respect of the other respondents.

C.A.47/2008

(i) Appeal dismissed.

(ii) Counter-notice of appeal dismissed in respect of the votes thrown away.

(iii) The certification by the learned Chief Justice to the Speaker of the House of Representatives and her order for the holding of a by-election in the constituency of West Portland are affirmed.

(iv) There shall be no order as to costs in respect of the appellate proceedings.

2. Both men were rival candidates for election in the constituency of West Portland in the General Election held on the 3rd September 2007 they having been nominated on August 7, 2007. Mr. Dabdoub, the unsuccessful candidate for the People's National Party received 6033 votes whereas Mr. Vaz , the candidate for the Jamaica Labour Party received 6977, the margin of victory for Mr. Vaz being 944 votes.

The Claim

3. On October 1, 2007, Mr. Dabdoub filed a fixed date claim form in the Supreme Court claiming that he had "a right of return as the duly elected Member of Parliament for the Constituency of West Portland". He sought the following:

> "1. A Determination that the First Respondent was, on the 7th August, 2007, not qualified to be elected to the House of Representatives

including for the constituency of West Portland.

2. A Determination that the nomination of the First Respondent on the 7th August, 2007 is invalid, null and void and of no legal effect.

3. A Determination that the Claimant/Petitioner, being the only qualified validly nominated candidate on the 7 August 2007, was and is entitled to be returned to the House of Representatives as the duly elected member for the Constituency of West Portland.

5. (sic) An Order that the Claimant/Petitioner be returned as the duly elected Member of the House of Representatives for the Constituency of West Portland.

6. A Certificate directed to the Speaker of the House of Representatives pursuant to Section 20(f) of the Election Petitions Act that the 1st Respondent was not duly elected or returned and that the Claimant/Petitioner is the duly elected and duly returned candidate for the constituency of West Portland.

7. Alternatively the Claimant/Petitioner claims a determination that the 1st Respondent did breach Sections 91 and 92 of the Representation of the People Act and that the said election be declared null and void.

8...

9..."

4. The particulars of claim alleged, among other things, that Mr. Vaz "is a businessman, a citizen of the United States of America, and the holder of a United States of America passport issued by the Government of that country

through its embassy in Kingston, Jamaica". This was communicated by Mr. Dabdoub to the returning officer, Mr. Carlton Harris (2nd respondent in appeal no. 45), in the presence of witnesses at the time of the nomination exercise. Accordingly, Mr. Dabdoub was claiming that the nomination of Mr. Vaz was null and void and he Dabdoub was therefore the only validly nominated candidate and as such was entitled to be returned as the duly elected Member of Parliament for the constituency. The passport number of Mr. Vaz is quoted as 710898440, and it is alleged that he has used it for travel.

5. The main plank of the claim by Mr. Dabdoub is stated in paragraph 11 of his particulars of claim thus:

> "... Section 40(2)(a) of the Constitution of Jamaica specifically provides that no person shall be qualified to be elected as a Member of the House of Representatives who is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign Power or State".

The particulars of claim state further that the United States of America is a foreign Power or State, and that posters were published indicating the names of candidates (including Mr. Vaz) who were thought to be persons who had sworn allegiance, adherence and obedience to a foreign power and so were disqualified in accordance with section 40(2)(a) of the Constitution. The particulars state that the constituents were advised not to waste their votes.

6. The particulars of claim further alleged that Mr. Dabdoub had heard a statement on radio attributed to the respondent Vaz denying that he had sworn allegiance to any foreign country, and that he held a United States passport by virtue of his mother who is a United States citizen. Consequently, Mr. Dabdoub sought and received legal opinion and prepared a Notice of Disqualification which he printed and published to the constituents of West Portland, maintaining that Mr. Vaz was disqualified.

7. Paragraphs 23 and 24 of the particulars of claim contain allegations of corrupt efforts by Mr. Vaz "directly and indirectly by himself and other persons on his behalf" to influence the voters in the constituency to vote for him, by distributing "to hundreds of voters" food and zinc sheets. Notwithstanding the damning nature of these serious allegations, Mr. Dabdoub's counsel advised the Honourable Chief Justice at a case management conference on or about November 1, 2007, that he would not pursue them. Given the details of these particulars, if there was evidence to support them, it is unfortunate that such evidence was not presented so that the Court would have been in a position to pronounce thereon. Allegations of corruption are not to be lightly pleaded and, when pleaded, efforts should be made to prove them.

The Defence

8. In his Defence filed on November 16, 2007, Mr. Vaz contended that he was duly nominated and elected. He admitted being a citizen of the United

States of America, and the holder of a United States passport. He is also a citizen and national of Jamaica, and holds a valid Jamaican passport. He was born at Nuttall Hospital in the parish of Saint Andrew, his parents being "Douglas Vaz former member of the JLP and Minister of Government and Sonia Mais nee Vaz" (sic). His mother was born in Puerto Rico, and as such is a citizen of the United States as of right. She lived in Puerto Rico until she was ten years old. She then went to reside in New York in the United States of America where she remained for eleven years until she married Douglas Vaz in 1959 and came to Jamaica to live. She remained in Jamaica until recently when she migrated to Canada.

9. Mr. Vaz first acquired a United States of America passport in 1968 when he and his siblings were added to his mother's passport. She had registered his birth at the United States Embassy in Jamaica. This registration process resulted in Mr. Vaz acquiring United States citizenship "by virtue of derivation at birth pursuant to Section 301(A)(7) of the Immigration and Nationality Act of 1962 which is now called U.S.C. Section 1401(G) and which was then 8 U.S.C. Section 301(A)(7)".

10. The pleading further discloses that sometime after 1978, Mr. Vaz' mother was instrumental in securing Mr. Vaz' own passport. Since becoming an adult, he has applied to renew it and his current valid United States of America passport was issued in 2004.

11. Mr. Vaz denied acting in contravention of section 40(2)(a) of the Constitution, and has pleaded that he has not by virtue of his own act been under any acknowledgment of allegiance, obedience or adherence to a foreign Power or State. His position is that "by operation of United States law he has been under an allegiance to that Power from birth by reason of his United States citizenship which he acquired as a matter of right at birth and not by virtue of any affirmative act by either himself or his mother. This fact is evident on the face of the Report of Birth Abroad dated 2nd December 1964" (para. 14 of the Defence).

12. In the alternative, he contended that having regard to the fact that he was a United States citizen at birth, the acquisition and/or renewal of his United States passports did not as a matter of law confer on him any status and/or disability that he did not already have prior to the acquisition or renewal of the passports. There is no oath-taking requirement nor any acknowledgment of allegiance, adherence or obedience to the United States either in the passport application form and/or passport renewal form and/or in the body of the passport itself.

13. So far as the publication of notices in the constituency was concerned, it is pleaded in the Defence that Mr. Vaz was not aware of such publication being made to a substantial number of constituents. In any event, the Director of

Elections had on more than one occasion issued a news release confirming that all nominations for the General Election were valid, and advising that there were persons seeking to mislead voters by telling them that if they voted for a particular candidate their votes would be wasted.

14. If the Court were to find merit in Mr. Dabdoub's claim in relation to the interpretation of section 40(2)(a), the Defence contended that the proper relief would be for the people of the constituency to be given the opportunity to vote in a by-election for the candidate of their choice.

The constitutional provision

15. At this stage, it is appropriate to set out the constitutional provision that the parties agree is at the heart of the controversy between them. Section 40(2)(a) reads:

> "No person shall be qualified to be appointed as a Senator or elected as a member of the House of Representatives who-
>
> (a) is, by virtue of his own act under any acknowledgment of allegiance, obedience or adherence to a foreign power or state."

The findings of the Chief Justice

16. Having heard evidence and listened to lengthy submissions, the learned Chief Justice made the following findings:

- There was insufficient evidence on which to base a conclusion that Mr. Vaz had satisfied the residency

requirement necessary for the maintenance of his United States citizenship.

- The Jamaican Constitution clearly permits dual citizenship.

- Mr. Vaz is a dual citizen of the United States of America and Jamaica, and did not become a United States citizen by virtue of his own act.

- As a citizen of the United States of America, Mr. Vaz is entitled to obtain a United States passport.

- Mr. Vaz is the holder of a valid United States passport which he has maintained, renewed and used for travel to various countries noted in it, before and after his nomination for the 2007 General Election.

- On several occasions, Mr. Vaz has presented himself to Immigration Authorities as being an American citizen and when he did so he understood his obligations as such.

- If Mr. Vaz had not renewed his passport, but had retained his American citizenship, there could have been no doubt that he had obtained American citizenship involuntarily and no question of disqualification could have arisen.

- Had Mr. Vaz not renewed and travelled on his United States passport it could not have been argued that he was under any acknowledgment of allegiance to the United States of America by virtue of his own act.

- It is not the owing of allegiance to the United States of America by virtue of being a citizen of that country that is a ground for disqualification from sitting in the House of Representatives but rather the voluntary taking of steps to acknowledge that citizenship that causes the disqualification.

- There is no prohibition of dual citizens who obtained that status involuntarily from sitting in Parliament but if such a citizen by his own act is under any acknowledgment of obedience or adherence to a foreign power he is disqualified from so doing.

The learned Chief Justice held that:

- The words "acknowledgment of allegiance, obedience and adherence to a foreign power" in section 40(2)(a) of the Jamaican Constitution are wide enough to embrace a citizen who is a subject or citizen of a foreign power.

- Section 40(2) also justifiably imposes disqualification from sitting in the Houses of Parliament on several citizens of Jamaica by birth.

- It is abundantly clear that the Constitution does not confer on every Jamaican citizen the right to be elected as a Member of the House of Representatives.

- By his positive acts of renewing and travelling on his United States passport Mr. Vaz has by virtue of his own act acknowledged his allegiance, obedience or adherence to the United States of America and by virtue of section 40(2)(a) he was not qualified to be elected as a Member of the House of Representatives.

17. So far as it concerns the question of the electors having thrown away their votes by voting for Mr. Vaz, the learned Chief Justice found that:

> "In the circumstances of this case... having regard to the statement and press release issued by Mr. Walker in his official capacity as Director of Elections that all 146 candidates were properly nominated, there was no sufficient notice based on facts which are clear, definite and certain, to the knowledge of the voters in the constituency of West Portland so as to entitle this Court to find that their votes are thrown away. In these circumstances a by-election must be held so as

> to enable the electors of West Portland to choose their representative".

18. The findings of the learned Chief Justice clearly indicate that the evidence in respect of the application for, and the use of, the United States passport by Mr. Vaz featured heavily in her decision that Mr. Vaz was disqualified by virtue of section 40(2)(a) of the Constitution. The determination of these appeals therefore depends in large measure on our scrutiny of that evidence and its impact in construing section 40(2)(a).

Grounds of Appeal

19. The grounds of appeal are several – twelve filed on behalf of each appellant. It is necessary to summarize them.

Mr. Dabdoub's grounds

Two of these grounds relate to costs. They all, naturally, complain of errors of law made by the Chief Justice. The complaints are as follows:

1. Not recognizing that the mere possession of a United States passport by a middle-aged man is in itself an acknowledgment of allegiance;

2. Not recognizing that citizenship of a foreign power or state, including the United States of America, is itself a disqualification for nomination to the House of Representatives;

3. Failing to consider the effect of the admission by Mr. Vaz on public radio prior to election day that he is an American citizen;

4. Failing to recognize that once the electorate's attention has been drawn to the fact that Mr. Vaz holds United States citizenship and a United States

passport the electorate is presumed to know the legal consequences;

5. Finding that it is the voluntary taking of steps to acknowledge citizenship of the United States of America that causes the disqualification;

6. Finding that there should be a by-election, instead of a return of Mr. Dabdoub as the duly elected member;

7. Finding that the "Notice of Disqualification" was not "clear definite and certain";

8. Finding that there was no sufficient notice to the electorate as to Mr. Vaz' status;

9. Giving effect to the press releases of the Director of Elections;

10. Misinterpreting the case of ***Drinkwater v Deakin***; and

11. Failing to apply proper judicial discretion in respect of the award of costs;

Mr. Vaz' grounds

The grounds filed by this appellant challenge the judgment on the basis of the following:

1. Failure to properly construe the relevant constitutional provisions;

2. Failing to take into consideration the following:

   - The international trend towards an acceptance of dual citizenship;

   - The legal significance of Article 25 of the United Nations International Covenant on Civil and Political Rights;

- The legal effect of the amendment to section 8 of the Constitution which removed the prohibition against dual citizenship;

- The omission of the word 'citizen' in section 40(2)(a) of the Constitution when read in conjunction with section 41(d) where the word 'citizen' is included, demonstrating that the Jamaican Constitution permits dual citizenship.

3. Failing to appreciate that the words 'by his own act' in section 40(2)(a) do not apply to the appellant who acquired United States citizenship by operation of law by virtue of his mother, and who is therefore entitled to the rights and privileges of dual citizenship with respect to both Jamaica and the United States;

4. Failing to properly apply and/or have sufficient regard for the principles set out in the United States' Supreme Court decisions of ***Kawakita and Jalbuena,*** by holding that the acts of renewing and travelling on the United States passport indicated that by virtue of his own act, the appellant Vaz had acknowledged allegiance, obedience or adherence to the United States of America;

5. Indicating a contradictory position by holding that 'by virtue of the provisions of the Constitution of Jamaica, a Jamaican by birth, descent or registration who is also a dual citizen cannot be deprived of his Jamaican Citizenship and that the First Respondent is therefore entitled to the rights and privileges afforded to him as a dual citizen';

6. Failing to properly interpret and/or apply the decision in ***Joyce v The Director of Public Prosecutions*** [1946] A.C. 347;

7. Incorrectly interpreting and relying on the Australian decision of ***Sykes v Cleary*** (No. 2) [1992] 176 CLR 77 and the Trinidadian case of ***Chaitan v The Attorney General*** [2001] 63 WIR 244.

The counter-notice of appeal

20. As if these grounds of appeal were not enough for the determination of the matter, Mr. Dabdoub filed a counter-notice of appeal on May 29, 2008, seeking affirmation of the judgment of the learned Chief Justice on the grounds that the appellant Vaz was not qualified for nomination or election as he was a citizen of, and thereby owed allegiance to, the United States of America; further, by his own act he was under an acknowledgment of allegiance to the United States of America. The positive acts of renewing and travelling on a United States passport were evidence of the acknowledgment of the allegiance owed by Mr. Vaz to the United States of America. In addition, the counter-notice states that Mr. Vaz' nomination was null and void and of no legal effect, so he was not duly returned or elected as a member of the House of Representatives.

21. It is further contended in the counter-notice that the learned Chief Justice erred in finding that there was no sufficient notice given to the electors as regards the disqualification of the candidate Vaz. In this respect, the evidence said to be to the contrary is recited in the notice.

22. As stated earlier, the evidence in relation to the renewal and usage of the United States passport by Mr. Vaz is critical to the outcome of the appeals. It is so as there is really no dispute as to the citizenship aspect. The other serious areas of dispute are consequential to that aspect of the case. These other areas

are the question of votes having been thrown away, and the issue of costs as ordered by the learned Chief Justice.

The evidence – allegiance and its acknowledgment

23. The evidence as to the important question of acknowledgment of allegiance, which formed the main plank of the learned Chief Justice's judgment, came mainly from affidavits and oral evidence given by Professor David Rowe (called on behalf of Mr. Dabdoub) and Mr. George Crimarco (called on behalf of Mr. Vaz). Both witnesses are attorneys-at-law who practise at the Florida Bar. Professor Rowe gave the following opinion:

> "35. As a United States citizen, the 1st respondent therefore owes the United States allegiance by the very fact of citizenship. This allegiance continues for as long as he shall continue to be a citizen. As a United States citizen there are certain rights, benefits and privileges that Mr. Vaz is entitled to including the right to a U.S Passport. Under U.S. Law he acknowledges his allegiance to the United States by applying for and by travelling on a United States Passport. This is borne out by the existing case and statute law.
>
> 36. If Mr. Vaz had never applied for a U.S. passport he could not be said to have become a citizen by virtue of his own act. By applying however he has by virtue of his own act acknowledged that U.S. citizenship and has acknowledged his allegiance by doing, concurring, and adopting the fact of his U.S. citizenship.
>
> 37. In my opinion, a citizen who applies for a passport is acknowledging his allegiance to the United States by the mere fact of his application. The right to a passport

> is a benefit or privilege accorded U.S. citizens who all owe allegiance to the United States. When one applies therefore for the benefit or privilege of a U.S. passport he by his own act acknowledges his allegiance to the United States. (See ***Woodward v Rogers*** at Page 13 inside column).
>
> 38. I am further advised by Mr. Gayle Nelson and do verily believe that the 1st Respondent has utilized his U.S. Passport for travel to various foreign countries. I am of the opinion that in utilizing the passport for travel purposes to foreign countries, the 1st Respondent has placed himself under the protection of the United States of America thereby acknowledging his allegiance to the United States. In doing so he has done so by virtue of his own act."

24. Professor Rowe, during his oral evidence, did not veer from his affidavit. In fact, he clarified and elaborated on the statutory provisions and the practice in the United States in respect of citizenship and the application for and renewal of an American passport. He was cross-examined at length, during which period it was suggested to him that his personal views in relation to Mrs. Simpson Miller, the Leader of the Opposition, had coloured the opinion that he was giving to the Court. This, he denied while asserting that he had been far closer to the JLP than the PNP, seeing that he was once "a foreign agent for (the) JLP during the Seaga administration" (p.29 Vol.2).

25. Mr. Crimarco's affidavit submitted to the Court below contained the following opinion:

"38. As a U.S. citizen Mr. Vaz owes certain duties of allegiance to the U.S. which continue so long as he remains a U.S. citizen. As a U.S. citizen Mr. Vaz is entitled to the rights and privileges conferred on citizens of the U.S. including the right to a U.S. passport. His actions in applying for a U.S. passport or in applying for a renewal of a U.S. passport is not treated under U.S. law as an act of allegiance, and neither was he or is he obliged to take an Oath of Allegiance to the U.S. when applying for a U.S. passport or when applying to renew a U.S. passport.

39. In applying the existing case law and statutory construction to the facts of the instant matter, it is my opinion that Mr. Vaz has, by virtue of holding a series of U.S. passports, done nothing to swear or affirm any allegiance to any foreign power nor has he taken an oath of allegiance to the U.S. nor has he done anything by his own act to be in violation thereof.

40. There is no requirement that an applicant for a U.S. passport must perform any act of allegiance or take any Oath to obtain the document. That is to say, the application and subsequent renewal of a passport does not require any Oath and does not constitute "an act of allegiance" to the U.S. Mr. Vaz' passport was obtained by his mother and his actions in renewing same several times thereafter are nothing other than acquisition of documents allowing for his travel as guaranteed to him by his birthright.

41. If Mr. Vaz never applied for a U.S passport, his U.S. citizenship would not cease since a U.S. passport, in and of itself is not conclusive proof of U.S. citizenship nor does its expiration terminate citizenship anymore than the expiration of a driver's license affects one's ability to drive.

> 42. The critical factor in the instant matter is whether or not the acquisition and subsequent renewal of a U.S. passport constitutes an 'acknowledgment of allegiance, obedience or adherence to a foreign Power or State'.
> The ***Woodward*** case clearly establishes that mere possession of a U.S. passport does not affirm or establish any allegiance whatsoever, it is merely a document used to evidence one's U.S. citizenship in certain circumstances. A U.S. passport does not confer citizenship on the holder and the absence of a U.S. passport does not remove U.S. citizenship.
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> 43. The current passport application only seeks affirmation that the applicant has not committed any of the expatriating acts and does not mandate any Oath of Allegiance.
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> 44. There is no U.S. law which prohibits dual citizenship and Mr. Vaz is free to retain his birthright Jamaican citizenship in the same way he may retain his U.S. citizenship unless he formally renounces it or expatriates himself."

26. Mr. Crimarco was cross-examined on the contents of his affidavit as to its sufficiency and accuracy in relation to the law as to citizenship and passport issuance and usage. He, among other things, agreed that Mr. Vaz in using his U.S. passport to gain entrance into several countries including Jamaica had presented himself as a citizen owing allegiance to the United States. In such situations, Mr. Vaz was under the protection of the United States Government. Mr. Vaz, he said, was recognizing by the use of his passport that he was a United States citizen (p.343-5 Vol. 2 Record of Appeal). Quite apart from the usage of

the passport, Mr. Crimarco agreed that the signing of the application forms for the issuing of the passport indicated that the issuing authority was satisfied that the applicant owed allegiance to the United States; also, that the applicant was also confirming that he owed allegiance to the United States (p.325 Vol.2). The application form is signed by an applicant while under penalty of perjury (p.324 Vol.2). It is clear therefore that Mr. Crimarco's evidence under cross-examination conflicted with the opinion he gave in the affidavit, and was more in keeping with that given by Professor Rowe, who had been called by Mr. Dabdoub.

27. It seems to me that the learned Chief Justice had no choice, given the evidence from both sides, but to conclude as she did in respect of the acknowledgment of allegiance. This evidence had been given by two attorneys-at-law who practice in the field of immigration and citizenship matters. Their opinion was accepted by the learned Chief Justice, and I have been unable to see anything wrong with her acceptance of that opinion.

The evidence as to votes thrown away

28. There is no doubt whatsoever that there was evidence presented on behalf of Mr. Dabdoub to show that strenuous efforts were made by him to communicate the information that he had as well as his view of Mr. Vaz' United States' citizenship, and the implications for the election. He used the media as well as posters to advise electors of Mr. Vaz' status. Indeed, according to Mr. Dabdoub's affidavit sworn to on 5th December 2007, he even saw some of the

posters on light poles. He no doubt would not have countenanced such defacing of the poles given the provisions of the Litter Act. He also had a "Notice of Disqualification" with a legal opinion printed, and he distributed same throughout the constituency.

29. In the face of Mr. Dabdoub's publications in respect of the candidacy of Mr. Vaz, the Director of Elections, Mr. Danville Walker, issued two documents, one entitled "Press Statement", and the other "Press Release". In the first, dated 16th August, 2007, the Electoral Office of Jamaica advised all media houses and the public that all 146 candidates for the up-coming General Election had been properly nominated and that only a court of law could deem a candidate as not qualified. The Electoral Office cautioned the media and the public against falling prey and being misled by election or political gimmickry in what it regarded as a sensitive period leading up to the General Election.

30. The Press Release issued on August 31, 2007, reiterated the statement released on August 16. It asked the public to be aware that persons were apparently seeking to mislead electors that votes cast for certain candidates would be wasted. The Electoral Office was specific in describing this situation that was being posited by the "persons" as "false". The Electoral Office took the opportunity to remind the candidates that it was an offence under the Representation of the People Act to publish false statements aimed at procuring the election of a candidate or to affect the return of any candidate at the

election. Not only did the Director of Elections issue these communications, but he was also on talk shows discussing the issues.

The constitutional issue – was Mr. Vaz disqualified?

31. The written submissions advanced by the attorneys-at-law were copious; so too were the oral submissions. In support, reference was made by each attorney-at-law to numerous cases. Needless to say, these cases as well as the other written authorities had to be read for full understanding and appreciation. The numerous attachments and exhibits also had to be considered. This has been no easy task, and we thank the attorneys for the assistance they gave. They voiced the high importance they have placed on the outcome of this case. To put this in context, it is appropriate to quote Mr. Gayle Nelson who appeared for Mr. Dabdoub. He commenced his preface to his written submissions thus:

> "This case has more at stake than a contest between two men. Only superficially does this case concern who should be the Member of Parliament for West Portland."

He followed this up in his oral submissions by saying that section 40(2)(a) of the Constitution is not really about citizenship. The words "by ... his own act", he said, do not mean that there had to be some positive act, as there are acts of omission and Mr. Vaz' election not to renounce his United States citizenship contained an element of voluntariness. Mr. Dabdoub, he said, needed only to give notice of the basic fact of Mr. Vaz' disqualification, and that would

automatically entitle him to be seated as the Member of Parliament for West Portland.

32. Mr. Ransford Braham who made submissions on behalf of Mr. Vaz, said that the important word in section 40(2)(a) was "under", and that the question for determination was how did one come to be "under" acknowledgment of allegiance, obedience or adherence to a foreign Power or State. He submitted that once someone comes under that acknowledgment, nothing can be further done to place that person under the acknowledgment. In the instant case, he said, Mr. Vaz came under acknowledgment by an involuntary act, that is, through his birth. There is nothing else, he argued, that Mr. Vaz can do to put himself "under" the acknowledgment as he was placed there by his birth, which was not a voluntary act on his part. The United States passport adds nothing to the situation, he said. In the circumstances, according to Mr. Braham, there was no question of Mr. Vaz not being qualified to be elected as a Member of the House of Representatives.

33. Mr. Braham's argument may have appeared attractive and, indeed, was along the lines put forward by Mr. Crimarco in his affidavit. However, as stated earlier, Mr. Crimarco changed his opinion under cross-examination. The practical result of the convergence of opinion between Professor Rowe and Mr. Crimarco was that the learned Chief Justice was given what may be regarded as a joint opinion on the question of acknowledgment of allegiance to the United States. It

has to be borne in mind that that question has to be determined according to the law of the United States of America. The Australian case of ***Sykes v Cleary*** [1992] 176 C.L.R. 77 bears this out. In the joint opinion of Mason, C.J., Toohey, J and McHugh, J, it is stated:

> "Here the question is different: is the candidate a subject or citizen or entitled to the rights or privileges of a subject or citizen of a foreign power? And, as already stated, at common law, as in international law, that question is to be determined according to the law of the foreign State."(p.107)

The appellant Vaz has challenged the Chief Justice's apparent reliance on ***Sykes v Cleary,*** and that is understandable in view of the difference in the facts and arguments in that case, compared to the instant case. However, it is noted that Deane, J. did say (at p.127) that being "under... acknowledgment of allegiance, obedience or adherence to a foreign power" involves an element of acceptance or at least acquiescence on the part of the relevant person. To that extent, the case supports the submission that the acquisition and use of a passport are strong indicia of acceptance.

34. As said earlier, the legal opinion given to the learned Chief Justice provided a solid and sound base for the conclusion that Mr. Vaz was by virtue of his own act under acknowledgment of allegiance obedience or adherence to the United States of America. The consequence of that state of affairs is that he was not qualified to be elected to the House of Representatives. The Chief Justice was, in my view, correct to point out that it was not Mr. Vaz' United States'

citizenship per se that disqualified him from being elected to the House of Representatives. He did not become a United States' citizen by virtue of his own act, so there was no disqualification on that score. It was his voluntary acknowledgment of allegiance etc. that barred him.

35. The framers of the constitution clearly intended that Jamaicans who by their own act sought and received non-Commonwealth citizenship, or having not so sought it, nevertheless voluntarily acknowledged allegiance to such countries, should not sit in the House of Representatives. It does not matter that they were born in Jamaica. It is a notorious fact that over the years many Jamaicans have acquired foreign citizenship, and many others are constantly in the process of seeking such status. If they choose a distant autocratic, unfriendly Commonwealth country for citizenship status, they can still serve in the House of Representatives. If, however, they choose to acquire such status in the United States of America, their friendly and accommodating neighbour to the north, they are disqualified. That may seem an oddity given the fact that many Jamaicans seek United States citizenship and are more likely to be accommodated in that country compared with the level of accommodation they would receive in many Commonwealth countries. However, that is the constitution.

36. Having arrived at the conclusion at which I have on this aspect of the case, I wish to mention a statement that Mr. Jalil Dabdoub made in his oral presentation during the afternoon of November 27, 2008:

> "This is not a case about dual citizenship....Dual citizenship is a red herring. Is he qualified to represent the constituency?"

The impression given by that statement is that Mr.Vaz' citizenship was of no moment so far as the outcome of the case was concerned. However, on the following morning, he said:

> "A citizen is always under an acknowledgment of allegiance."

He then continued:

> "As a citizen, he is under acknowledgment to the United States of America and he has elected to maintain his status, and declares to the world when he travels that he is under acknowledgment of allegiance to the United States. He is disqualified by virtue of his foreign citizenship and voluntarily maintaining allegiance..."

It seems to me that the first statement contradicts the others. In any event it contradicts Mr. Dabdoub's own pleadings. Paragraphs 6, 7 and 13 of the particulars of claim read thus:

> "6. The First Respondent is a businessman, **a citizen of the United States of America,** and the holder of a United States of America passport issued by the Government of that country through its Embassy in Kingston, Jamaica and for the purposes hereof his address is ...

> 7. That at the time when he was nominated the Claimant/Petitioner indicated to the Second Respondent in the presence of witnesses that the 1st Respondent was **an American citizen** and was disqualified from standing for election to the House of Representatives ...
>
> 13. That subsequent to nomination day the question of whether a person who held **citizenship in a foreign country** could be elected to the House of Representatives arose in the public media and was the subject of much discussion in the public media."

The fact of the matter is that the case was instituted on the basis that Mr. Vaz had citizenship other than Jamaican, and that he had acknowledged allegiance to the foreign state of which he was a citizen. As it turned out, the citizenship was acquired in circumstances which by themselves without more would not have resulted in Mr. Vaz' disqualification. That was a finding made by the learned Chief Justice, and with which I fully agree. It is therefore not correct to say that this case is not about dual citizenship. It is the foreign citizenship that gave birth to it.

37. Given the heat and passion that the case has generated, if the manner of the oral presentations is anything to go by, it may well be time for consideration to be given by the relevant authorities as to whether the constitution is reflecting the will of the people in this regard. Mr. Nelson in his oral submissions said that "the sovereignty of the nation has to be protected". It is interesting to note that

the colonial power, from which we were supposed to have freed ourselves in 1962, has no written constitution of its own. Consideration has to be given to the reasoning behind the relevant clauses in the constitution to see whether our history since 1962 and present day realities warrant amendments to the constitution. Mr. Nelson, in the preface to his written submissions, also said:

> "The courts must safeguard for Jamaicans their constitutional right to be represented only by people who owe, and who appear to owe, their undivided loyalty to Jamaica."

No one can deny the need for such loyalty. Consequently, it seems that Mr. Nelson would have no difficulty were it to be suggested that in any consideration of amendments to the constitution, the following two questions would be apt for discussion:

> (i) should any person other than a Jamaican citizen be allowed to sit in the House of Representatives?
>
> (ii) should any Jamaican citizen who has citizenship of any other country be allowed to sit in the House of Representatives?

In order to ensure the undivided loyalty of which Mr. Nelson speaks, it may well be useful to extend the discussion to all positions of authority provided for in the constitution.

Should the losing candidate be declared elected?

38. This question may also be phrased thus: did the voters throw their votes away? In that regard, Mr. Nelson made the following submission:

> "Where there is a lack of qualification, disabling illegality or legal incapacity in relation to a candidate in an election, one remedy is to hold the election again. Another is to award the seat to the best supported lawful candidate by applying the "Votes Wasted" or "Votes Thrown Away" doctrine."

If the words used by Mr. Nelson are to be given their natural meaning, he has started off by conceding that there were two clear choices before the learned Chief Justice – either "hold the election again" or "award the seat to the best supported lawful candidate". The Chief Justice chose the former and in so doing has earned the displeasure of the very proponent of the idea that she had two choices. Counsel on all sides have referred to many cases but, with respect, I have not been able to see where any of these cases has shown that the Chief Justice was in error.

39. Mr. Jalil Dabdoub, it seems to me, tried to give this aspect of the case a constitutional flavour by bringing section 39 of the Constitution into the picture. He argued that section 39 deals with the qualification for election to the House, and that since Mr. Vaz was not qualified, he could not have been properly nominated. As a result of the improper nomination, only one person (Mr. Dabdoub) was nominated and so he should have been declared the winner of the election in keeping with section 23(2) of the Representation of the People Act. The relevant sections read thus:

Section 39 of the Constitution

> " Subject to the provisions of section 40 of this Constitution, any person, who at the date of his appointment or nomination for election –
>
> (a) is a Commonwealth citizen of the age of twenty-one years or upwards; and
>
> (b) has been ordinarily resident in Jamaica for the immediately preceding twelve months,
>
> shall be qualified to be appointed as a Senator or elected as a member of the House of Representatives and no other person shall be so qualified".

Section 23(2) of the Representation of the People Act

> "Any ten or more electors qualified to vote in a constituency for which an election is to be held may nominate any person qualified to be a member of the House of Representatives as a candidate by signing a nomination paper in the form set out in the Second Schedule and causing such nomination paper to be handed to the returning officer between the hours referred to in subsection (1):
>
> Provided that no candidate shall be deemed not to have been validly nominated by reason only of the fact that subsequent to nomination day any person by whom his nomination paper was signed is struck off any of the official lists for the relevant constituency."

40. I do not agree with the position that Mr. Jalil Dabdoub has put forward in this regard. The evidence indicates that two persons were nominated. So far as section 23(2) is concerned, the returning officer was merely required to see that

the necessary ten qualified electors had signed the nomination paper. Section 23(3) provides for the particulars to be specified on the nomination paper and subsection (5) provides for the payment of a deposit. At the close of the formalities, where only one candidate has been nominated, the returning officer is required to make a return forthwith to the Chief Electoral Officer that the candidate has been duly elected (section 27). Where more than one person has been nominated, a poll will be held.

41. The instant case follows the pattern of ***Nedd v Simon*** [1972] 3 WIR 347 a case from Grenada. There, the elected representative was not qualified for nomination as a candidate for election. The law made provisions for the returning officer to act in a manner similar to that set out in the preceding paragraph. In response to a submission that the seat should be declared in favour of the losing candidate, the Court of Appeal of the West Indies Associated States said that the section did not apply to the circumstances of the case where two persons were nominated. The question whether the appellant had not been duly nominated was of no concern to the returning officer. I adopt the reasoning of that Court.

42. The votes thrown away principle has been categorized by Mr. Braham "as unconstitutional, or at the very least incompatible with the Constitution of Jamaica". This categorization ignores the fact that the principle has been accepted in Jamaica and the wider Caribbean. Many cases have been cited but

there is no need to recite them given the fact that there can be no dispute as to the applicability of the principle. The cases merely narrate the varied situations which have occurred over the centuries. The fact is though that each case has to be adjudged according to its peculiar facts. In ***Nedd v Simon*** St. Bernard, J.A. said:

> "The principles enunciated in the above cases show quite clearly that as far back as 1714, when ***R v Boscawen*** ((1714), Easter, 13 Anne, cited 2 Cowp 537) was decided, the doctrine of notice to the electors of the disqualification of a candidate for election to an office, was already established by the courts of common law and that the English courts of common law have been applying that doctrine to all meetings assembled to deliberate and vote on the performance of a duty. In my view it is a general rule of law to be applied to all meetings assembled to deliberate and vote for candidates who offer themselves as persons fit and proper for holding certain offices but who are in fact disqualified owing to some rule or otherwise. It does not matter whether the meetings is one for the election of a chairman of a friendly society, a club, a parochial meeting or for the election of candidates at a general election for membership of the House of Representatives...I hold that the doctrine of notice to the electors of the disqualification of a candidate for any election is a part of the common law and it applies to this State." (p. 375 F-I)

In the said case, Lewis, C.J. said:

> "Where an elector with knowledge or after notice of a fact which disqualifies a candidate votes for him he is taken to have voluntarily abstained from exercising his franchise and his vote is regarded as thrown away. If the fact which creates the disqualification is notorious he is presumed to be aware of it and no notice is required. If after deducting the votes thrown away

> from the total number of votes cast for the disqualified candidate another candidate has a majority that candidate is entitled to the seat." (p. 353 H-I)

And Cecil Lewis, J.A. after a review of the cases added:

> "I conclude from these cases that the rule that votes given for a candidate after knowledge of his incapacity are thrown away was a doctrine which had been applied by the common law courts from the very earliest times." (p. 370 G)

43. In Jamaica, in ***Mattison v Junor*** (1977) 15 J.L.R. 194, Smith, C.J. sitting in the Election Court said at page 199 H-I:

> "There was, on the face of it, a valid nomination and no step was taken, or, it appears, could be taken, to prevent the poll from being held. The poll was held and Mr. Junor received the majority of the votes. It appears from ***Hobbs v Morey*** [1904] 1 K.B. 74, and from other authorities to which reference has been made, that the over-riding principle is this: that once an election is held, effect must be given to the will of the majority of the electorate and that a court should not lightly reject the will of the majority and impose upon an electorate a person whom the majority of them did not select to represent them. But the authorities are quite clear that if the electorate have due notice that a candidate is disqualified to be elected and with that knowledge they nevertheless vote for that candidate, then that will be tantamount to throwing their votes away and in that event the candidate who received the minority of the votes is entitled to be declared duly elected."

He proceeded to address the question of whether the electors in the Boroughbridge division had been given due notice that Mr. Junor was disqualified from being nominated or disqualified from being elected as a councillor. The

petition bore no allegation or statement that there had been such notice. He concluded that there had not been sufficient notice and added:

> "The majority for the candidate who was declared elected, that is to say, Mr. Junor, was not a marginal majority, where it could be said that at least 25 or 50 or 100 electors must have known the facts which disqualified him and so, where you have a narrow margin like that, those people must have known that they threw away their votes. This is a case where the majority is 399 votes. There have been winning margins far in excess of that, but how can I say with any confidence, how can I be sure, that 399 people or more knew the facts upon which the respondent Junor was disqualified and with that knowledge polled their votes? It seems to me an impossible finding to make." (p.201 H-I)

The distinguished jurist, Smith, C.J. concluded that the over-riding principle must be that the electorate are not to have imposed upon them a person for whom the majority of them did not cast their votes. He said that he was "very sorry" but it was impossible for him to make a finding that the majority of the electors must have known of Mr. Junor's disqualification, or the facts upon which his disqualification rested, and in spite of that willfully voted for him knowing that they were throwing away their votes (p.202 A-B).

44. I have no hesitation in saying that Smith, C.J. has in ***Mattison v Junor*** stated the position that applies in Jamaica. In the instant case, there was notice to electors, the number being uncertain. However, the official body in charge of the conduct of elections gave a rebutting notice to the electors that the notice from Mr. Dabdoub and his counsel was gimmickry, and that they were not to be

misled by it. In a country where political posturing takes pride of place among politicians and their supporters, it is not inconceivable that the majority of the electors even if they were aware of Mr. Dabdoub's notice, would have accepted the rebutting notices from the electoral body as gospel. Mr. Gayle Nelson purported to have given a legal opinion in respect of Mr. Vaz' acknowledgment of allegiance to the United States of America. With respect, the opinion was of absolutely no worth to the electors of West Portland, for the simple reason that Mr. Nelson has no known expertise in American law. In that situation, I have no doubt whatsoever that the learned Chief Justice was correct in the decision she made that a by-election should be ordered.

45. For the foregoing reasons, I agreed with my learned and respected brothers that the judgment of the Chief Justice was unassailable in respect of her findings that Mr. Vaz was disqualified, and that there should be a by-election to give the electors of West Portland an opportunity to determine who should be their representative in the House of Representatives. The margin of victory in the general election dictates it, in the same way it did in the ***Mattison v Junor*** case. However, so far as the Chief Justice's order as to costs is concerned, I am of the view that she erred. My learned brother Smith, J.A. has dealt with this aspect in a comprehensive manner, and I adopt what he has said. Mr. Dabdoub was substantially the winner of the action in that he unseated Mr. Vaz. That he failed to have himself inserted in the seat without a contest in place of Mr. Vaz does not make him a loser; hence, he was entitled to his costs.

46. Before finally parting with the matter, I wish to suggest that Parliament ought to contemplate legislation in relation to the consequences of the election of an unqualified candidate. This would eliminate the need to resort to the common law doctrine of "votes thrown away". There should be no grey areas. In the process of any review, Parliament and other appropriate bodies may well wish to consider whether the entire body of law and rules relating to election petitions ought not to be revisited with a view to establishing simplicity and certainty.

SMITH, J.A.:

47. These appeals are against an order of the Hon. Chief Justice made on the 11th April, 2008.

Procedure on Appeal

48. It was agreed by all concerned that these two appeals should be heard together. At the very outset, Ms. Archer, counsel for the 2nd, and 3rd respondents, was released from the proceedings.

49. The Court took the decision that Mr. Braham counsel for Mr. Vaz who is the appellant in the second appeal (Appeal No. 47/2000) and the respondent in the first,(Appeal No. 45/2000) would first address the Court. He would be followed by Mr. Jalil Dabdoub who filed a counter appeal in Appeal No. 47/2008 on behalf of the respondent Mr. Abraham Dabdoub. Mr. Nelson counsel for the appellant Dabdoub in appeal No. 45 of 2008 would then address the court. Thereafter, Mr. Braham would make his final submissions in reply in relation to Appeal No. 47/2008.

Background Facts

50. Messrs. Daryl Vaz and Abraham Dabdoub were candidates for the West Portland constituency in the General Elections of September 3, 2007. They represented the Jamaica Labour Party and the People's National Party respectively. At the conclusion of the counting of the ballots Mr. Vaz was declared to be the successful candidate. He was accordingly sworn in as the elected member of the House of Representatives.

51. On October 1, 2007, Mr. Dabdoub filed an Election Petition challenging the election of Mr. Vaz to the House of Representatives. The petitioner sought an order that the nomination of Mr. Vaz was null and void and that he, the petitioner, was the duly elected member for the constituency of West Portland. The petition was heard by the Honourable Chief Justice who on the 11th April, 2008 made the following order:

> "1. The first respondent on Nomination Day, August 7, 2007 was not qualified to be elected to the House of Representatives for the constituency of West Portland.
>
> 2. His nomination on that day is invalid, null and void and of no legal effect. He was not duly returned or elected as a Member of the House of Representatives and I am obliged to certify accordingly to the Speaker of the House of Representatives.
>
> 3. The petitioner is not entitled to be returned as the duly elected member of the House of Representatives for the constituency of West Portland and his claim for an order that he be returned as such is also refused.
>
> 4. The petitioner's claim that the first respondent did breach sections 91 and 92 of the Representation of the People's Act has not been pursued and the declaration sought is refused."

52. The learned Chief Justice made no order as to costs in respect of the petitioner (Mr. A. Dabdoub) and the 1st respondent (Mr. Vaz) as against each other. However, she ordered the petitioner to pay the costs of the second and third respondents.

53. Mr. Dabdoub's appeal No (45/2008) is primarily against item 3 of the Chief Justice's order and her order in relation to costs. Mr. Vaz's appeal (No 47/2008) is against items 1 and 2 of the said order. Mr. Dabdoub's counter notice of appeal in appeal No. 47/2008 seeks: (i) to affirm the learned Chief Justice's order in respect of items 1 and 2 on additional grounds to those relied on by the court; and (ii) to challenge item 3 of the order and the order as to costs. See Rule 2.3 of the CPR. It will be observed that Mr. Dabdoub's appeal (No 45/2008) and part (ii) of his counter appeal in No. 47/2008 are identical. Thus, for all practical purposes, M. Dabdoub's appeal is subsumed in his subsequent counter appeal.

The grounds filed by the parties disclose three main issues:

(1) Whether in light of the constitutional provisions Mr. Vaz was qualified to be elected as a member of the House of Representatives.

(2) If Mr. Vaz was not qualified whether or not Mr. Dabdoub was entitled to be returned as the duly elected member.

(3) Whether the Chief Justice wrongly exercised her discretion in awarding costs to the 2nd and 3rd respondents.

Issue No.1 – Was Mr. Vaz qualified for membership of the House of Representatives?

54. Section 39 of the Constitution of Jamaica addresses the qualification for membership of the House while section 40 deals with the disqualification for membership. Section 39 provides:

> "39. Subject to the provisions of section 40 of this Constitution, any person, who at the date of his appointment or nomination for election –
>
> (a) is a Commonwealth citizen of the age of twenty one years or upwards; and
>
> (b) has been ordinarily resident in Jamaica for the immediately preceding twelve months, shall be qualified to be appointed as a Senator or elected as a member of the House of Representatives and no other person shall be so qualified.

Section 40(2)(a) is the relevant part of section 40 it reads:

> "40. (2) –No person shall be qualified to be appointed as a Senator or elected as a member of the House of Representatives who—
>
> (a) is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign Power or State;
>
> (b)..."

55. The submissions on section 39 can be dealt with shortly. With reference to section 39, Mr. Jalil Dabdoub submits that this section sets the primary qualification and limits it by the phrases "subject to the provisions of s.40" and "no other person shall be so qualified". The

underlined words, he argues indicate that a person who is a commonwealth citizen and at the same time a foreign national is not qualified to be elected as a member of the House. It is his contention that for a person to be so appointed, he must be a commonwealth citizen only. Apparently counsel for petitioner could not find any authority to support this interpretation of s.39.

56. Mr. Braham on the other hand submits, correctly in my view, that "no other person" means a person who does not have a commonwealth citizen status. Thus if a person is a commonwealth citizen the fact that he is also a citizen of a "foreign" country does not by itself disqualify him. If he is of the age of twenty years or upwards and has been ordinarily resident in Jamaica for twelve months immediately preceding his nomination he should be qualified. This qualification is, of course, subject to section 40. As Mr. Braham contends if the framers of the Constitution had intended the interpretation canvassed by Mr. Jalil Dabdoub they would have used the word "only" after the words "commonwealth citizen."

57. I now turn to the more difficult s.40 (2) (a). First it is necessary, I think, to state some relevant undisputed facts. It is not disputed that Mr. Vaz was at the material time a citizen of the United States of America, a foreign Power. There is no dispute that he obtained his United States citizenship at birth, his mother being a United States citizen. His mother

married a Jamaican, Mr. Douglas Vaz. Mr. Daryl Vaz was born in Jamaica on December 15, 1963. His mother registered his birth at the United States Embassy in Jamaica and by virtue of the United States Immigration and Nationality Act, he became a citizen of the United States of America. There is also no dispute that Mr. Vaz has had a total of four (4) United States passports, the last of which was issued on the 5th of May, 2004. It is not disputed that he travelled on the United States passport to various countries before and after his nomination. On several occasions he presented himself to Immigration Authorities as being an American citizen. He registered as a United States citizen at an American College in Miami.

58. The learned Chief Justice in construing s.40 (2) (a) said (p. 34 of her judgment):

> "I hold that the words 'acknowledgment of allegiance obedience and adherence to a foreign power' in section 40 (2) (a) of the Jamaican Constitution are wide enough to embrace a citizen who is a subject or citizen of a foreign power".

And in applying s.40 (2) (a) to the evidence she said (p35):

> "I hold further that by his positive acts of renewing and travelling on his United States passport the first respondent has by virtue of his own act acknowledged his allegiance, obedience or adherence to the United States of America and by virtue of section 40 (2) (a) he was not qualified to be elected as a Member of the House of representatives".

Summary of Submissions

59. Before us Mr. Braham, Counsel for Mr. Vaz, submitted that the Chief Justice failed to properly construe section 40 (2) (a) of the Constitution in that she did not give effect to the plain meaning of the words used. In this regard he complained that the learned Chief Justice completely ignored the word "under" in sub section (2) (a).

60. Mr. Braham argued that the use of the word "under" in s. 40 (2) (a) indicates the state or position of the candidate as being subject to or under the control of a foreign Power. He submitted that "if a person achieves the position by involuntary means then nothing that is done thereafter can place that person under the acknowledgment again". He said that the Chief Justice was wrong in holding that Mr. Vaz's position was affected by the obtaining of an American passport and travelling thereon. It is the contention of Mr. Braham, that the issue is not whether Mr. Vaz acknowledged an allegiance, obedience or adherence but whether he was under an acknowledgment of allegiance etc.

61. Mr. Jalil Dabdoub on the other hand submitted that the status of being under an acknowledgement of allegiance may be obtained by the act of the person concerned or by the act of the foreign State or Power itself. He said that the acknowledgment may be made by the State issuing a passport to the person or conferring citizenship pursuant to its laws which then place that person under an acknowledgment of

allegiance - (see page 12, para. 28 of submissions). A person, he submitted, can acknowledge allegiance to a foreign State by applying for, renewing and travelling on a foreign passport, or by taking the oath of allegiance to a foreign State or Power or by describing himself in official documents as a citizen of a foreign State. In support of his submissions he referred to ***Spencer v Smith,*** Antigua and Barbuda High Court, 23 June 2003; ***Chaitan v Attorney General* (2001) 63 W.I.R 244; *Joyce v Director of Public Prosecutions*** (1946) A.C. 347; **Gerard Carneys Foreign Allegiance**: A vexed ground of Parliamentary Disqualification (1999) 11 (2) Bond Law Review 245 and ***Blumen v Haff*** 78 F 2nd 833.

62. Mr. Dabdoub also submitted that a person is voluntarily under acknowledgment of allegiance, if he made the conscious decision not to renounce the allegiance he is under by virtue of his citizenship. The decision not to renounce, he said, is evidence of an acknowledgment, acceptance and acquiescence in the allegiance. He cited ***Sykes v Cleary*** (No. 2) (1992) 176 CLR 77, ***Nile v Wood*** (1986) (167)CL R 133, 140 among others.

Analysis

63. For convenience I will restate the provision of s. 40 (2) (a) of the Constitution.

> "40-(2) No person shall be qualified to be appointed as a Senator or elected as a member of the House of Representatives who –

> (a) is, by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a foreign Power or State".

64. In my judgment the provisions of s.40 (2) (a) must be read in light of s.39 (supra) and s.41 (1) (d). The latter provides:

> "The seat of a member of either House shall become vacant –
>
> (d) if he ceases to be a Commonwealth citizen or takes any oath or makes any declaration or acknowledgment of allegiance, obedience or adherence to any foreign Power or State or does, concurs in or adopts any act done with the intention that he shall become a subject or citizen of any foreign Power or State".

65. As stated before s. 39 speaks to the qualification for membership of the Senate and House. Section 40 (2) (a) addresses the disqualification for appointment or election and s. 41 (1) speaks to the position of a member who subsequent to his appointment or election becomes disqualified.

66. To my mind it is as clear as can be that the disqualifying acts referred to in s.41(1) (d) are the means by which a person will be regarded as being "under acknowledgment of allegiance, obedience or adherence to a foreign power" pursuant to s.40 (2) (a). As was stated in ***Sykes v Cleary*** (supra) such a provision was designed to ensure that "Members of Parliament did not have a split allegiance and were not, as

far as possible, subject to any improper influence from foreign governments".

67. In ***Spencer v Smith*** (supra) on which the Chief Justice relied, the High Court of Antigua and Barbuda per Mitchell J. held that a provision identical to s.40 (2) (a) did not apply to a person who obtained foreign citizenship by an act of law without any application on his part but that one who has himself taken the necessary step to acknowledge allegiance to a foreign State for example by naturalization, is not qualified. I am afraid I cannot accept the submissions of Mr. Braham that a person who has taken such steps is not by that fact under an acknowledgement of allegiance.

68. The critical question, then, is: has Mr. Vaz himself taken any steps to acknowledge allegiance to a foreign Power or State? It is not in dispute that the United States of America is a foreign Power within the meaning of the Constitution. As stated earlier, it is also not in dispute that Mr. Vaz had, by birth, acquired United States citizenship. The issue on appeal is whether he by renewing and travelling on his foreign passport had taken positive steps to acknowledge allegiance to the United States of America. Allegiance is defined as "the obligation of fidelity and obedience to government owed by an individual in consideration for the protection that government gives. See Words and Phrases Legally Defined 4th Ed. p. 115. It is a legal bond in which there are two (2) parties – the subject and

sovereign. It is referred to as a mutual bond and obligation between the sovereign and his subject (a government and its citizens) because the subject has a duty to serve and be loyal and the sovereign a duty to protect – **op. cit.**

69. The word 'acknowledge' means to "accept or admit the existence or truth of; to confirm receipt of or gratitude for" – **Concise Oxford English Dictionary,** Thumb Index Edition 10th Edn. , Revised.

70. I accept as correct, the submission of Mr. Jalil Dabdoub that the status of being under an acknowledgement of allegiance may be obtained by the act of the concerned person or by the act of the foreign State or Power itself.

71. According to the evidence of Mr. George Crimarco, the expert on foreign law, under the immigration law of the United States;

(i) Mr. Vaz acquired United States citizenship by derivation through his mother who was born in Puerto Rico.

(ii) In order to obtain a United States passport one has to apply for same, and satisfy the Secretary of State that he or she owes allegiance to the United States. Only persons owing allegiance to the United States can obtain a United States passport, under United States law.

72. In my opinion, there is merit in the submission of Mr. Dabdoub that the issuing of a United States passport to Mr. Vaz is an acknowledgement by the United States that Mr. Vaz owes allegiance to the United States.

73. The authorities show that by renewing and travelling on a passport, an individual is by virtue of his own act acknowledging allegiance to the State which issues the passport.

74. The decision of the House of Lords in ***Joyce v DPP*** (supra) is instructive. The facts as gleaned from the head note in part, are as follows: In 1933 the appellant, an American citizen who had resided in British territory for about twenty-four (24) years applied for and obtained a British passport, describing himself as a British subject by birth and stating that he required it for the purpose of holiday touring in Belgium, France, Germany, Switzerland, Italy and Austria. On its expiration he obtained renewals on September 24, 1938 and on August 24, 1939, each for a period of one (1) year, again describing himself as a British subject. After the outbreak of war between Great Britain and Germany and before the expiration of the validity of the renewed passport, he was proved to have been employed by the German radio company and to have delivered from enemy territory broadcast talks in English hostile to Great Britain. The passport was not found in his possession when he was arrested. He was convicted of high treason. He appealed, challenging among other things, (1) the court's jurisdiction to try an alien for an offence against British law

committed in a foreign country and (2) the judge's direction to the jury that the appellant owed allegiance to His Majesty the King during the period from September 18, 1939 to July 2, 1940. His appeal was dismissed.

75. In his speech Lord Jowitt, L.C. said at p 369:

> "The terms of a passport are familiar. It is thus described by Lord Alverstone C.J., in ***R v Brailsford*** (1905) 2KB 730, 745:
>
> > 'it is a document issued in the name of the sovereign on the responsibility of a minister of the Crown to a named individual intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries'.
>
> By its terms it requests and requires in the name of His Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need".

After stating what a passport means to a British subject Lord Jowitt L. C. continued:

> "But the possession of a passport by one who is not a British subject gives him rights and imposes upon the sovereign obligations which would otherwise not be given or imposed... By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects. By his own act he has maintained the bond which while he was within the realm bound him to his sovereign".

At p. 371 the learned Lord Chancellor said:

> "I should make it clear that it is no part of the case for the Crown that the appellant is debarred from alleging that he is not a British subject. The contention is a different one: it is that by the holding of a passport he asserts and maintains the relation in which he formerly stood, claiming the continued protection of the Crown and thereby pledging the continuance of his fidelity. In these circumstances I am clearly of opinion that so long as he holds the passport he is within the meaning of the statute a man who, if he is adherent to the King's enemies in the realm or elsewhere commits an act of treason".

76. The decision of the House of Lords in the **Joyce** case makes it clear that a person who holds a passport is under an acknowledgement of allegiance. And that a person who renews his passport is by his own act under an acknowledgement of allegiance.

77. Another case in point is ***Sue v Hill*** (1999) 199 CLR 462 referred to by the learned Chief Justice. In that case Henry Sue petitioned the High Court of Australia for an order that Heather Hill, who had been declared to be elected as a member of the Senate, was incapable of being chosen and was accordingly not duly elected, because as at the date of her nomination, she was under an acknowledgement of allegiance, obedience or adherence to a foreign power etc. Mrs. Hill was born in the United Kingdom and thus became a citizen of the United Kingdom. In 1971 she and her parents migrated to Australia. In 1981 she married an Australian citizen. There were two (2) children of the marriage, both born

in Australia. In 1990 she travelled overseas for a short holiday on her British passport which expired in 1992. In 1998 she made an application to become an Australian citizen. Before her application was granted an emergency arose and she had to travel with her parents to New Zealand. Because she was ineligible to obtain an Australian passport, she sought and obtained a British passport. Her application for Australian citizenship was later granted and she applied for an Australian passport. Her United Kingdom passport was current at the time of her nomination and election. It was held that she was disqualified because her renewal of the passport was an acknowledgement of allegiance to the United Kingdom.

78. In the instant case, it is in my view correct to say that by renewing and travelling on his United States passport Mr. Vaz was by his own act under an acknowledgement of allegiance to a foreign power. He was accordingly disqualified from membership of the House by virtue of s. 40 (2) (a).

79. Mr. Vaz's appeal must therefore fail. In the light of this decision I need not deal with part 1 of Mr. A. Dabdoub's counter appeal. The interesting points raised therein, should in my view be reserved for another occasion.

Issue No.2 –Whether consequent on Mr. Vaz's disqualification, Mr. Dabdoub is entitled to be returned as the duly elected member.

80. In the court below, Mr. Gayle Nelson contended that if Mr. Vaz was not qualified, Mr. Abraham Dabdoub was entitled to be returned to the

House as the duly elected member for the constituency in question as due notice of Mr. Vaz's disqualification was given to the electors during the election campaign.

81. The learned Chief Justice accepted the following statement of Weeramantry, J. in ***Peiris v Perera*** (1969) 72 New Law Reports of Ceylon 232 at 271 as the correct formulation of the relevant principles:

> "Essential to the proper conduct of elections is the requirement that only candidates qualified in law to be Members of Parliament should offer themselves to the electorate. Those who already labour under a disqualification which by law prevents them from taking their seats in Parliament go to the polls at their peril and those who vote for them with knowledge of the facts grounding such a disqualification record their votes in vain. This is a principle now ingrained in the law relating to elections and ingrained for the very good reason that the dignity and decorum which must attend the Parliamentary process are at all costs to be preserved".

82. Long before 1874 it was established that if an elector votes for a candidate he knows is disqualified, that elector's vote is thrown away – see ***Drinkwater v Deakin*** (1874) 9 L RCP 626. This is known as the "votes thrown away" principle. In ***Stephen Mattison v John Junor*** (1977) 15 JLR 194 Smith C.J. emphasized that the person with the majority of the remaining valid votes cannot be declared the duly elected candidate unless he can show that the electorate was given due notice of the disqualification. At p. 199 H-I, Smith C.J. said:

> "It appears from ***Hobbs v Morey*** [(1904) 1 KB 74] and from other authorities to which reference has been made, that the overriding principle is this: that once an election is held, effect must be given to the will of the majority of the electorate and that a court should not lightly reject the will of the majority of the electorate and impose upon an electorate a person whom the majority of them did not select to represent them. But the authorities are quite clear that if the electorate have due notice that a candidate is disqualified to be elected and with that knowledge they nevertheless vote for that candidate, then that will be tantamount to throwing their votes away and in that event the candidate who received the minority of the votes is entitled to be declared duly elected".

83. This in my view is a correct statement of the law which McCalla, C.J. applied to the instant case – see page 46 of her judgment. Indeed many cases have clarified and applied the votes thrown away principle. The cases indicate that the disqualification must be founded on some positive and definite fact existing and established at the time of the polling. If on proof of such facts the voters nevertheless vote for the candidate concerned, their votes would be thrown away or wasted – see for example ***Peiris v Perera*** (supra) Before us Mr. Nelson argued that the learned Chief Justice erred in holding that:

> "There was not sufficient notice based on facts which are clear, definite and certain, to the knowledge of the voters in the constituency of West Portland so as to entitle this Court to find that their votes are thrown away. In these circumstances a by-election must be held so as to enable the electors of West Portland to choose their representative"

84. Mr. Nelson submitted that whether the disqualifying facts are "clear definite and certain" depends on whether it is reasonably clear to the electors that such facts are true. The notice is sufficient, he argued, if it "puts the party on inquiry and throws on him the obligations of ascertaining whether the ground of disqualification did not exist". He relied on ***Wakefield*** case (1842) *Brown and Austin's* cases 270.

85. Counsel cited a long list of cases starting from as far back as ***R v Boscawen*** (1714) referred to in ***R v Monday*** (1777) 2 Cowper's Reports 1224, 1228 in support of his contention that the notice to the electors of Mr. Vaz's disqualification was "clear, definite and certain".

86. Mr. Braham for Mr. Vaz, submitted that the learned Chief Justice properly applied the relevant legal principles in coming to her decision that Mr. Dabdoub was not entitled to be returned as the elected candidate for the West Portland constituency on the basis of Mr. Vaz's disqualification. Further, Counsel for Mr. Vaz argued that if the latter was disqualified, such disqualification occurred by reason of his conduct and actions and that the notice of the alleged disqualification was insufficient in light of the press statements made by the then Director of Elections, Mr. Danville Walker.

87. Mr. Braham also sought to argue that the concept of "votes thrown away" is unconstitutional or at the very least incompatible with the Constitution of Jamaica. In this regard Counsel referred to sections 38 (1)

(a) and 45 (2) of the Constitution. In my opinion s. 38 (1) (a) is not relevant to the "votes thrown away" concept. And s.45 (2) speaks to the circumstances in which the seat of a person validly elected or appointed to either House should become vacant. It does not concern a person who has not been validly elected. From the 18th century the common law has been that "where there is a legal incapacity, and the fact of a candidate being under such incapacity is known, the votes for him are thrown away" – see **Southampton** (1776) Clifford 224.

88. In ***R v Hawkins*** (1808) 103 ER 755, one of the many cases cited by Mr. Nelson, the candidate had not taken the Holy Sacrament within a year, which the candidate admitted. A notice of the incapacity was given to the electors. It was held that their votes were thrown away. In ***Mattison v Junor*** (supra) Smith, C.J. accepted the votes thrown away principle. There is no doubt in my mind that the "votes thrown away" principle is part of the law of this country. By virtue of Section 4 (1) of the Jamaica (Constitution) Order in Council, 1962 all laws which were in force in Jamaica immediately before the appointed day (i.e. August 6, 1962) unless repealed continue in force on and after that day. "Law" in s. 4 (1) as in s. 26 (8) of the Constitution is not confined to enacted law but includes the common law – see ***Director of Public Prosecutions v Nasralla*** (1967) 10 W.I.R 299 at 304. Thus the "votes thrown away' principle of law

which existed long before the appointed day continues in force and will be the law of this country until it is repealed by Parliament.

89. It seems to me that in determining the issue as to Mr. Dabdoub's entitlement to be declared the winner, the critical question is whether the facts grounding Mr. Vaz's disqualification of which the electors were notified were clear, definite and certain. If the facts grounding the disqualification are not definite and certain then the votes cannot be regarded as thrown away. The authorities seem to establish that facts on which the disqualification is founded are reasonably established to be clear, definite and certain if they are:

1. Obvious or notorious so that they admit of no uncertainty – ***Peiris v Perera*** (supra) at p. 251 and **County of Tipperary** (1875) 3 **O'Malley and Hardcastle** 19; or

2. Unchallenged or uncontradicted or admitted. For example in ***R v Hawkins*** (1808) 103 ER 755, 757 the candidate admitted that he had not taken the Holy Sacrament within a year. It was held that all the votes given for the candidate after such notice were thrown away and the other candidate having the greatest number of legal votes, was duly elected; or

3. Proved. For example where the candidate is a minor and his age is proved.

90. In the instant case, there can be no doubt that Mr. Dabdoub left no stone unturned in bringing to the notice of the electors concerned the facts which he claimed disqualified Mr. Vaz from membership of the House. Notices of disqualification were issued to the electors of West Portland. The legal opinion of Mr. Gayle Nelson was endorsed on the back of the notices. These notices and the legal opinion are set out in the learned Chief Justice's judgment. In his opinion, Mr. Nelson reproduces the provisions of s.40 (2) (a) of the Constitution and cites a case from the Court of Appeal of Trinidad and Tobago. He states that the effect of s.40 (2) (a) is that a Jamaican citizen who wishes to become a member of the House of Representatives must have no allegiance, obedience or adherence to a foreign country. He also states that it is not only a matter of swearing allegiance to a foreign country which disqualifies but also the voluntary acknowledgement of allegiance, obedience or adherence to a foreign power. He concludes that the nomination of such a person is invalid, null and void.

91. But these notices were not all. The Director of Elections, Mr. Danville Walker entered the fray perhaps inadvisedly. First, he issued the following press statement on August 16, 2007:

> "The Electoral Office of Jamaica wishes to advise all media houses and the public that all 146 candidates for the up-coming General Election to be held on August 27, 2007 have been properly nominated and that only a court of law can deem a candidate not qualified. We

> caution the media and the public not to fall prey and be misled by election or political gimmickry in this sensitive period leading up to the General Election".

92. It is not disputed that this statement received wide publicity. About two (2) weeks later the Director of Elections followed up the statement with a press release:

> "The Electoral Office of Jamaica has noticed that leading up to the election there continues to be misleading documents challenging the validity of the nomination of candidates. The Director of Elections would like to reiterate a statement released on August 16, 2007.
>
> All 146 candidates have been properly nominated and will be on the ballots printed for the election to be held on September 3, 2007. The public is asked to be aware that persons are apparently seeking to mislead electors that votes cast for certain candidates will be wasted. This is False. Electors are encouraged to go and vote on election day.
> ..."

93. This press release ended with a warning to candidates and the public that it is a criminal offence for anyone to make or publish any false statement in relation to the personal character or conduct of a candidate for the purpose of affecting the return of such candidate at the election.

94. In considering the effect of the press statement and press release on the notice of disqualification, the learned Chief Justice quoted with approval the following statement of Weeramantry, J in the ***Perera*** case (p.249):

> "If the facts grounding the disqualification are not definite then the vote cannot be regarded as thrown away. For instance if there is an allegation of facts at the time of the election which become definite and certain only at a later point in time in as much as those facts have not been adjudicated upon at the date of the election, they remain, so far as the voter is concerned mere unproved allegations. In such cases although the candidate may be declared disqualified and the elections avoided, the seat cannot be awarded to the next candidate for there is not that definiteness about the facts grounding the disqualification, which would be essential if the votes are to be treated as thrown away."

The learned Chief Justice was of the view that because of the statement and press release issued by Mr. Walker in his official capacity as Director of Elections there was not that definiteness about the facts grounding the disqualification at the time of the election. Accordingly she held that a by-election must be held to enable the electors to choose their candidate.

95. Mr. Jalil Dabdoub is contending that the learned Chief Justice erred in so concluding because (i) the press releases did not dispute the underlying facts that Mr. Vaz was a United States citizen and the holder of a U.S. passport; (ii) the press releases were legally confused and beyond the power or authority of Mr. Walker. Many authorities were referred to arguendo.

96. Mr. Braham on the other hand contends that the learned Chief Justice was right as any uncertainty in the minds of voters with respect to

the facts grounding the disqualification is not a basis to treat the votes as thrown away. The statements of the Director of Elections, he contends, constitute an attack on the substrata of the alleged disqualification of Mr. Vaz. The facts grounding the alleged disqualification were not clear definite and certain in the light of Mr. Walker's statements. Counsel raised the point as to whether the existence of uncertainty as to the legal consequences of votes thrown away should be a relevant consideration. In this regard Mr. Braham referred to an extract from **Halsbury's Laws of England** (3rd Edn.) Volume 14 para. 549 which reads:

> "If however, the disqualification is not notorious and depends on legal arguments or upon complicated facts and inferences it would appear that even though the candidate may be unseated by reason of his disqualification the votes given for him will not be thrown away so as to give the seat to the candidate with the next highest number of votes."

It is reasonably clear from the authorities that where the facts grounding the disqualification are not definite, clear and certain then the vote for the disqualified candidate cannot be treated as wasted or thrown away. Also it is certainly clear that where the facts grounding the disqualification are definite and certain and the law applicable to those facts is reasonably definite and certain in the minds of the voter, a vote cast in those circumstances would be a vote thrown away. "And if the voter has that knowledge he cannot prevent the legal consequences following by asserting that he did not know that the law would under such

circumstances give the seat to the candidate that was qualified" - see ***Drinkwater v Deakin*** (supra) at p. 642. However the difficulty arises where the facts grounding the disqualification are definite and certain but there is uncertainty in the minds of the voters in regard to the legal effect of those facts so that the voters are not certain that disqualification will result in law.

97. There seems to be a dichotomy of views on this point. One view is that the principle of **ignorantia legis non excusat** is strictly applicable and votes cast for the disqualified candidate would be votes thrown away. This view finds favour with Mr. Nelson and Mr. Jalil Dabdoub. The other view, it seems, is that:

> "A disqualification depending upon a novel question or one of doubt or difficulty or upon legal argument and decision upon complicated facts and inferences does not cause votes to be so thrown away as to seat the opponent on a minority of votes".

In such a case there would not be an inflexible approach to the presumption that everyone knows the law – see ***The Queen v Mayor of Tewkesbury*** (1867-8) 3 LRQ B 629. Mr. Braham embraces this view. Counsel on both sides referred to a plethora of authorities. An interesting case is that of ***In re Parliamentary Election for Bristol South East*** (1964) 2QB 257. The respondent in that case was a peer of the United Kingdom and entitled to a Writ of Summons to sit in the House of Lords. As such he was disqualified from sitting in the House of Commons. In fact the House of

Commons had resolved that the respondent on succession to the viscounty had ceased to be and was disqualified from membership of the House of Commons.

98. At an election called to replace the respondent, the respondent was nominated and also the petitioner. Notice was given to the electors, on behalf of the petitioner, that the respondent was a peer and was found by the Committee of Privileges and the House of Commons to be disqualified from membership of the House of Commons. The electors were warned that all votes for the respondent would be thrown away. The respondent in a counter notice denied that he was a peer and that he was disqualified. The respondent, at the polls received more than twice the votes received by the petitioner. The petitioner was successful in his application to unseat the respondent and the votes for the respondent were treated as thrown away. The Election Court held inter alia that:

> "(4) Where the facts which constitute incapacity or disqualification by status of a candidate from election exist and are made known to the electorate before their votes are cast and the voters are also made aware that the legal consequences of those facts might constitute disqualification votes given to such candidate are given at the electors' peril, and where disqualification in law is established such votes are thrown away and are null and void and the court is bound to declare that the candidate for whom the highest number of valid votes was cast has been duly elected."

The Election Court expressed the view that the voters must not only know the facts which constitute disqualification by status but must also be aware that in law the consequences of those facts might constitute disqualification. As presently advised, I must confess an inclination to the latter view referred to above. However, in my opinion, for the purposes of this appeal, it is not necessary to determine whether disqualification based on complex legal arguments would result in votes being thrown away.

99. In my judgment because of Mr. Walker's intervention, it cannot reasonably be said that the facts grounding Mr. Vaz's disqualification of which the electors of West Portland were informed, were clear, definite and certain at the time of the election. Mr. Walker, the then Director of Elections and a Commissioner of the Electoral Commission told the electors that all 146 were properly nominated and that only a court of law "can deem a candidate not qualified".

100. He cautioned them not to fall prey and be misled by gimmickry. He told them that persons were seeking to mislead electors that votes cast for certain candidates would be wasted. He told them that that was false. The facts grounding the disqualification were thus contradicted and challenged by the person in charge of the electoral system in Jamaica. It would not be reasonable to conclude that in such a situation a voter of ordinary care and intelligence would be convinced that such facts as

would constitute disqualification existed assuming of course that he knew what legally constituted disqualification. A vote cast for Mr. Vaz in those circumstances should not, in my view, be treated as wasted or thrown away. "The disqualification must be founded on some positive and definite fact existing and established at the time of the poll so as to lead to the fair inference of wilful perverseness on the part of the electors voting for the disqualified person" – **Halsbury's Laws of England** Volume 15 (4th Ed) para. 835.

101. The learned Chief Justice was right in holding that the votes cast for the disqualified Mr. Vaz, should not, in the circumstances of the case, be treated as thrown away. It follows that she did not err in directing that a by-election be held.

3rd issue – The Award of Costs

102. The learned C.J. stated at the end of the judgment:

> "Having regard to the foregoing, I make no order as to costs in respect of the petitioner and the first respondent as against each other.
>
> The petitioner must bear the costs of the second and third respondents herein, to be taxed if not agreed".

Mr. Dabdoub's complaint against the order as to costs is twofold:

1. That the learned Chief Justice wrongfully exercised her discretion in regard to the award of costs against the

petitioner Dabdoub in favour of the 2nd and 3rd respondents.

2. That the learned Chief Justice erred in making no order as to costs between the petitioner and the 1st respondent as against each other.

103. The 2nd respondent Mr. Carlton Harris was the Returning Officer for West Portland. The 3rd respondent was joined pursuant to the Crown Proceedings Act. I will deal with the second aspect of the complaint first.

104. Mr. Gayle Nelson and Mr. Jalil Dabdoub submitted that for the following reasons, the learned Chief Justice erred in ordering the petitioner to pay the costs of the 2nd and 3rd respondents:

1. Although the 2nd respondent was served with a Fixed Date Claim Form HCV 03490 filed before the elections were held, he was not served with the Election Petition (Fixed Date Claim Form HCV 03921).
2. The 2nd and 3rd respondents did not in fact enter an acknowledgment of service of the Election Petition.
3. At Case Management the Appellant/Petitioner had indicated that he was not pursuing any claim against the 2nd and 3rd respondents.
4. The 2nd and 3rd respondents remained in the case at the invitation of the Chief Justice.

5. That in such circumstances therefore no issue of award of costs could or should arise.

105. At pps. 2-3 of her judgment the learned Chief Justice set out the reliefs sought by the petitioner. No claim was made against the 2nd and 3rd respondents. At p. 52 of the judgment the learned Chief Justice found that the Returning Officer had no authority to determine whether the first respondent was qualified for nomination and concluded that the reliefs claimed against the second and third defendants must therefore be refused.

106. In so far as the Election Petition is concerned, it seems to me that the learned Chief Justice was of the view that the petitioner had made claims against the 2nd and 3rd respondents. But there was no such claim in the petition. Indeed the conduct of the Returning Officer was not challenged. It seems that the overriding reason for the exercise of her discretion in awarding costs to the 2nd and 3rd respondents was the mistaken belief that the petitioner had claimed relief against the 2nd and 3rd respondents. In those circumstances the discretion was exercised on grounds wholly unconnected with the petition. ***Smiths Ltd. v Middleton*** (No. 2) (1986) 1 WLR 598 indicates that an Appellate Court may interfere with such an exercise of discretion if the extraneous consideration was the overriding or only reason for the exercise of the discretion. Accordingly, I would set aside the order made below.

107. The other aspect of the costs issue is the complaint that the learned Chief Justice erred in not awarding costs to the petitioner against the 1st respondent. The substantive issue before the Chief Justice was whether or not Mr. Vaz, the 1st respondent, was qualified for election to the House of Representatives. The court below found that pursuant to section 40 (2) (a) of the Constitution Mr. Vaz was not so qualified. The remedy asked for by the petitioner was an order directing that he be returned as the duly elected member. However the remedy granted by the Chief Justice was to unseat Mr. Vaz and order a by-election.

108. Counsel for the petitioner submitted that the general rule is that costs should follow the event. He referred to s. 28 of the Elections Petitions Act which makes specific provisions in relation to the award and taxation of costs of and incidental to the presentation of a petition. This section gives the court the discretion to determine how the costs and expenses should be defrayed. The section provides that regard should be had to the disallowance of costs charges and expenses which may in the opinion of the court have been caused by: (1) vexatious conduct, (2) unfounded allegations, or (3) unfounded objections, on the part of either the petitioner or the respondent.

109. Section 28 further provides that regard should be had to the discouragement of needless expenses by throwing the burden of paying

such costs on the culpable party whether or not such party is on the whole successful.

110. The contention of counsel for the petitioner is that the petitioner should be awarded costs against Mr. Vaz unless the learned Chief Justice found that he was guilty of vexatious conduct or unfounded allegations or unfounded objections or of incurring needless expenses. In my view this contention is correct.

111. As was stated in ***Johnsey Estates (1990) Ltd. v The Secretary of State for the Environment*** (2001) EWCA 535 at para. 21, the starting point for the exercise of the discretion is that costs should follow the event. It may be said, in the light of s.28, that to make an order by which the costs did not follow the event there must be good cause.

112. There is no evidence of any act of "misconduct" on the part of the petitioner. I accept the submission of petitioner's counsel that the learned Chief Justice erred in principle in departing from the general principle that costs should follow the event. I would therefore set aside the order and would award costs to the petitioner to be paid by the respondent Mr. Vaz.

Conclusion

113. I have had the opportunity to read the judgments of Panton, P. and Harrison J.A. and agree with the reasons and conclusions. For the reasons given, I would affirm the Order of the Chief Justice at 1, 2 and 3. I would set aside her order as to costs and substitute therefor the following:

(i) There shall be no order as to costs in the court below in respect of the 2nd and 3rd respondents.

(ii) The petitioner Mr. Dabdoub is to have the costs of the proceedings in the court below as against the 1st respondent Mr. Vaz. I would make no order as to costs in respect of proceedings in this court.

HARRISON, J.A.

114. I agree with my brothers, as to the outcome of these appeals and counter-notice of appeal but I wish however, to add a judgment of my own on two issues of general importance. They concern (i) disqualification of the candidate; and (ii) the "votes thrown away" principle.

The Disqualification Issue

115. The question of substantive law on this issue is whether Mr. Daryl Vaz (the first respondent) at the time of his nomination, was disqualified to be nominated and finally elected to the House of Representatives ("the House").

116. The facts which gave rise to the disqualification dispute can be stated very briefly. The undisputed evidence is that the first respondent's mother was born in Puerto Rico and was a United States citizen. In 1959 she married Douglas Vaz a Jamaican and gave birth to the first respondent in Jamaica on December 15, 1963. She registered his birth at the United States Embassy in Jamaica in accordance with United States law, which by law conferred on him the status of being a United States citizen. As a child he was added to his mother's passport but on attaining the age of majority he applied for, renewed and travelled on his United States passport to various countries noted in it. The learned Chief Justice held that he was disqualified to be elected to the House since by virtue of his own act he was under an acknowledgement of allegiance to the United States of America.

117. Now, section 39 of the Constitution prescribes the primary qualification for election as a member of the House or appointment to the Senate and it reads as follows:

> "39. Subject to the provisions of section 40 of this Constitution, any person, who at the date of his appointment or nomination for election –
>
> (a) is a Commonwealth citizen of the age of twenty-one years or upwards; and
>
> (b) has been ordinarily resident in Jamaica for the immediately preceding twelve months,
>
> shall be qualified to be appointed as a Senator or elected as a member of the House of Representatives and **no other person shall be so qualified**". (emphasis supplied)

118. Section 40 prescribes the categories of persons who are not qualified to be appointed to the Senate or elected to the House of Representatives. Section 40(2) (a) in particular provides that:

> "40 (2) No person shall be qualified to be appointed as a Senator or elected as a member of the House of Representatives who –
>
> (a) is, **by virtue of his own act**, under any acknowledgement of allegiance, obedience or adherence to a foreign Power or State" (emphasis supplied)

Section 41(1) (d) concerns elected Members and states inter alia as follows:

> "41 (1) The seat of a member of either House shall become vacant -
>
> ...

> (d) if he ceases to be a Commonwealth citizen or takes any oath or makes any declaration or acknowledgement of allegiance, obedience or adherence to any foreign Power or State or does, concurs in or adopts any act done with the intention that he shall become a subject or citizen of any foreign Power or State".

119. Both Professor David Rowe and George Crimarco were called as expert witnesses and they gave evidence before the learned Chief Justice to the effect that every citizen of the United States owes and is under an acknowledgement of allegiance to the United States. Incidentally, Mr. Crimarco was the first respondent's own witness on American law. That issue having been resolved the only question which remained for determination was whether the first respondent had "by virtue of his own act" acknowledged allegiance to the United States.

120. The learned Chief Justice stated inter alia at page 33 of her judgment:

> "...If he had not renewed his passport but nevertheless retained his American citizenship in such a case there could have been no doubt that he had obtained American Citizenship involuntarily and no question of disqualification could have arisen. Had he not renewed and travelled on his United States passport it could not have been argued that he was under any acknowledgment of allegiance to the United States of America by virtue of his own act".

And at page 35 she continued:

> "I hold further that by his positive acts of renewing and travelling on his United States passport the first respondent has by virtue of his own act acknowledged his allegiance, obedience or adherence to the United States of America and by virtue of section 40(2) (a) he was not qualified to be elected as a Member of the House of Representatives.

> This Court is bound to give effect to the clear words of the section. Parliament has the option to repeal or amend section 40(2) (a) if it sees fit".

121. In **Joyce v Director of Public Prosecutions** [1946] AC 347 the House of Lords held that the use of a passport by a citizen is an indication that he acknowledges his duty of allegiance to the country that issued the passport. Lord Jowitt L.C said at page 369 of the judgment:

> "The terms of a passport are familiar. It is thus described by Lord Alverstone CJ, in *R v Brailsford* (1):
>
> > 'It is a document issued in the name of the sovereign on the responsibility of a minister of the Crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries.'
>
> By its terms it requests and requires in the name of His Majesty all those whom it may concern to allow the bearer to pass freely without let or hindrance and to afford him every assistance and protection of which he may stand in need. It is, I think, true that the possession of a passport by a British subject does not increase the sovereign's duty of protection, though it will make his path easier. For him it serves as a voucher and means of identification. But the possession of a passport by one who is not a British subject gives him rights and imposes upon the sovereign obligations which would otherwise not be given or imposed."

122. In my judgment, the authority of **Joyce** (supra) is highly persuasive in this Court and the above dicta apply equally to someone who is a citizen of the United States and holds a passport from that country. I am persuaded by the submissions of Mr. Jalil

Dabdoub and find that the first respondent was, by his positive acts of applying for, renewing, and travelling on his United States passport under an acknowledgment of allegiance to a foreign power which rendered him not qualified to be elected to the House. His acknowledgement of allegiance to a foreign Power was certainly in conflict with the provisions of Section 40 (2) (a) of the Constitution. It was and still is the intent of the framers of the Constitution that only persons who have undivided loyalty to Jamaica should be elected to Parliament or appointed to the Senate.

The Votes Thrown Away Issue

123. The subject of "thrown-away votes" is one of considerable importance, inasmuch as it affects the validity of parliamentary elections. The principle of election law is that when there has been an election the candidate who is declared to be elected must be shown to have the majority of votes.

124. Where persons are not qualified to sit in Parliament, are elected and returned, in most instances, the election may not be declared void altogether, but the petitioning candidate who stood next upon the poll to the person improperly returned will be seated if the electors had timely notice of his incapacity. See **Drinkwater v Deakin** (1874) 9 LRCP 626. Again, if notice of a non-apparent disqualification of a candidate is given to the electorate, then the vote of any elector voting for that candidate will be held to have been given perversely and so thrown away, and in such a case the candidate with the minority of votes may be declared elected.

125. Where the fact of disqualification is notorious, every man would be presumed to know the law upon such fact. Such notoriety and such a disqualification could occur, however, in very few instances. This occurred in **Re Parliamentary Election for Bristol South East** [1964] 2 QB 257 where the respondent to a Petition was disqualified for election to the House of Commons because of his inherited peerage. During the election campaign the opposing candidate gave public notice that the candidate Benn was disqualified. Benn gave a counter notice disputing it. There, the Court focused on the voters' knowledge of the facts underlying the alleged disqualification and the votes cast for him were held to have been thrown away.

126. What is abundantly clear from the authorities is that the facts alleged to ground the disqualification of a candidate must be **clear, definite and certain**. See **Peiris v Perera** (1969) 72 New Law Reports of Ceylon 232. In that case a successful candidate was found guilty by an election judge of corrupt practice. On appeal, Weeramantry J., stated inter alia:

> 'Our law, following the English Law on this matter, provides that the seat may be awarded to the candidate next at the poll in cases where the votes cast for the successful candidate are regarded as having been thrown away. It is clear that where a vote is cast by a voter with knowledge of a disqualification which is definite and certain at the time, that vote must be regarded as thrown away so that it would be treated as not cast, and that upon the elimination of such votes the seat will be awarded to the candidate next at the poll. In order that a disqualification be regarded as definite and certain, it must in the first case be based on facts which are **definite and certain.** If the facts grounding the disqualification are not definite then the vote cannot be regarded as thrown away. For instance if there is an

> allegation of facts at the time of the election which become definite and certain only at a later point in time in as much as those facts have not been adjudicated upon at the date of the election, they remain, so far as the voter is concerned mere unproved allegations. In such cases, although the candidate may be declared disqualified and the election avoided, the seat cannot be awarded to the next candidate for there is not definiteness about the facts grounding the disqualification, which would be essential if the votes are to be treated as thrown away...
>
> The principle underlying such a rule is self evident and needs no elaboration, for a vote cannot be treated as thrown away merely because there was an allegation of fact about the candidate for whom they were east (sic) which at the time of the voting may have been true or untrue, and which the voter could not be expected and would not in most cases be able to verify". (emphasis supplied)

127. Halsbury's Laws of England, Volume 15, Fourth Edition, is also instructive and makes it clear that the notice of disqualification must be positive and definite. The learned authors state at paragraph 835:

> "Votes given for a candidate who is disqualified may in certain circumstances be regarded as not given at all or thrown away and to decide this scrutiny is not necessary.
>
> The **disqualification must be founded on some positive and definite fact existing and established at the time of the poll so as to lead to the fair inference of willful perverseness on the part of the electors voting for the disqualified person**." (emphasis supplied)

128. The rule of "votes thrown away" is probably not widely known to voters in this country but the principle has been established however, in the law of Jamaica. See **Stephen Mattison v John Junor** (1977) 15 J.L.R 194. In that case, an Election Petition was brought by Mr. Mattison on the basis that the respondent Mr. John Junor

was not qualified for election to the Parish Council. The respondent conceded that the election was void but the main issue for determination was whether the petitioner was entitled to be declared duly elected or whether a by-election should be held to fill Mr. Junor's seat. The Court held that the majority of electors were not made aware that Mr. Junor was disqualified and declined to declare that the petitioner was duly elected.

129. Smith C.J. said inter alia at page 198 of his judgment:

> "The decision in **Hobbs v Morey** ... is, apparently, still the law and if followed would be authority for saying that the petitioner cannot claim the seat in this case unless he can show that the votes given in favour of the respondent Junor must be regarded as having been thrown away..."

130. In this appeal, the question before us is whether the appellant Dabdoub has the right to be seated in the House by virtue of the first respondent's disqualification. Counsel for the appellant Dabdoub argued that he should be the elected candidate since there were only two candidates for election in the constituency of West Portland. He submitted that the disqualification which prevented the first respondent from being elected is also a disqualification which prevented him from being nominated and based on the authority of **Nedd v Simon** (1972) 19 WIR 347 (a case from Grenada) a candidate needs to be qualified on Nomination day. The argument which is put forward is that there being consequently only one valid nomination, pursuant to section 23(2) of The Representation of the People Act, then the appellant Dabdoub who obtained the minority of votes in the election, would be the only validly elected person. The argument even goes further to say that the first respondent who received the majority of votes, those votes should be altogether disregarded and treated as thrown away.

131. In my judgment, the disqualification of the first respondent is beyond dispute but I cannot agree with the views expressed by Mr. Jalil Dabdoub. It is a fact that there are conflicting schools of thought on the principle of "votes thrown away". Mr. Braham submitted that from his point of view, the concept of votes thrown away is unconstitutional or at the very least, incompatible with the Constitution of Jamaica. He also submitted that if the facts are clear, definite and certain, but there is uncertainty as to the legal effect which flows from those facts, the votes should not be treated as thrown away. He argued that in the instant case, the facts were uncertain and the legal consequences also uncertain. Both Mr. Gayle Nelson and Mr. Jalil Dabdoub have submitted however, in this Court and in the court below that the appellant Dabdoub would be in effect the only duly elected candidate for the constituency of West Portland and that this court should give due regard to the law. They submitted that the notices of disqualification that were given to the electorate were notorious and did meet the various tests propounded in relation to the principle of "votes thrown away".

132. In an article "The Powers, Duties and Liabilities of an Election Agent and of a Returning Officer at a Parliamentary Election in England and Wales" by Parker, (one of the leading authors on elections), he stated inter alia at page 153:

> '...So where the disqualification is not clear, but doubtful, and depends on argument and decision as to the effect of complicated facts and legal inferences, the decisions of the old election committees are conflicting. Some committees held that if the disqualification did in fact exist at the election, the decision established in the disqualification related back to the time of election, and nullify the votes given thereat after notice of the disqualification, on the

> ground that every man is bound to know the law; and therefore, when apprised by notice of the fact creating the disqualification of the candidate for whom he voted, his vote was given at his own risk and if he were wrong in his construction of the law he could not plead ignorance or mistake ... and upon these grounds they seated the candidate next on the poll ... other committees observed the distinction, and where the alleged disqualification was disputed, and was not clear but doubtful, they, while unseating the disqualified candidate, yet declined to give the seat to the qualified candidate... The law in such cases has not been declared by the election judges, but it must be remembered that the words in the 2nd Clitheroe case (2 P.R &D 276): 'that the disqualification must be founded on some positive and definite fact existing and established at the time of polling' have been approved and followed in Drinkwater v. Deaken ... and the Lord Chief Justice in that case (see PP 649, 640) seems to doubt whether votes are thrown away where the disqualification depends on an uncertain or obscure legal question or in that such a case a voter gives his vote at his own risk and on his own responsibility ... It has also been said that to hold the contrary, is to place each individual elector in a position of hardship and difficulty, if upon the mere assertion of an opposing party that a disqualification exists, the truth or falsehood of which the voter may have no means of ascertaining, he is to exercise his franchise at the risk of his vote being thrown away, if on subsequent investigation the existence of that disqualification should be established .... It is submitted, therefore, that a disqualification depending upon a novel question or one, of doubt or difficulty or upon legal argument and decision upon complicated facts and inferences, does not cause votes to be so thrown away as to seat the opponent on a minority of votes"

133. I turn now to the notice of disqualification which is at the centre of controversy in the present appeal. It was published in August 2007, just days before the General Election was held on September 3, 2007. The evidence adduced at the hearing before the learned Chief Justice showed that the notice had been widely distributed. It referred

to the first respondent being: (i) a citizen of the United States of America, a foreign Power or State, (ii) the holder of a passport issued to him by the Government of the United States; (iii) that the first respondent was disqualified to be elected a Member of the House by virtue of section 40(2)(a) of the Constitution and; (iv) that all the votes given or cast for him would by reason of the disqualification and incapacity to be elected be thrown away and be null and void. A legal opinion by Mr. Gayle Nelson, Attorney at Law was endorsed on the notice.

134. Mr. Danville Walker, the Director of Elections "jumped into the arena" as one would say, and informed the constituents of West Portland:

a) that misleading documents were distributed challenging the validity of the nomination of candidates;

b) that only a court of law could deem a candidate not qualified and that the media and the public were cautioned not to fall prey and be misled by election or political gimmickry in the sensitive period leading up to the General Election.

c) that all 146 candidates had been properly nominated;

d) that persons were apparently seeking to mislead electors that votes cast for certain candidates would be wasted and that that statement was false; and

d) that electors were encouraged to go out and vote on Election Day.

135. Mr. Jalil Dabdoub submitted however, that there was no legal basis upon which Mr. Walker had intervened and therefore his intervention should be totally disregarded by the court. He argued that no attempt was made in the Press Statement or the Press Release to raise a dispute about the facts that the first respondent was a United States citizen and the holder of a United States passport. He submitted that it was therefore a contradiction and error of law for the learned Chief Justice to say that:

> "having regard to the statement and press release issued by Mr. Walker ... there was no sufficient notice based on facts which are clear, definite and certain, to the knowledge of the voters..."

136. It is my considered view, that the learned Chief Justice was correct to consider what impact if any, the press statement, and release had on the voters in West Portland since Mr. Walker was acting in his official capacity as Director of Elections and as a Commissioner of the Electoral Commission of Jamaica. He did admit in his evidence before the Chief Justice that he did not seek legal advice from the Attorney General's Department. It seems to me nevertheless, from a common sense point of view, that ordinary people would more likely believe what the Director of Elections had published in his statement and release to members of the constituency. A seed of doubt would undoubtedly have been sown by Mr. Walker in the minds of voters, and this could possibly have caused them to disregard the notice of disqualification. Furthermore, the disqualification depended upon legal argument which according to Parker on Elections, would not cause votes to be thrown away as to seat the opponent on a minority of votes. It could not be said that in these circumstances, (i) that the voters had acted

with "**wilful perverseness**" so as to permit the court to treat the votes cast for the first respondent as thrown away and; (ii) that the notices of disqualification were "**clear, definite and certain**".

137. In my judgment, the learned Chief Justice was therefore correct, (i) when she refused to treat the votes cast on behalf of the first respondent as thrown away and (ii) decided that a by-election should be held in the constituency in order to allow the voters to decide which candidate should be elected.

Conclusion

138. These are my reasons for agreeing with the decision pronounced on February 27, 2009.