IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE
APPELLATE JURISDI CTION

CIVIL APPEAL NO. 50 of 2021

BETWEEN:-

1. THE ATTORNEY GENERAL OF GUYANA
2. SARAH BROWNE
3. VIKASH RAMKISSOON

Appellants

- and -

1. CHRISTOPHER JONES
2. THE SPEAKER OF THE NATIONALASSEMBLY

Respondents

IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE
APPELLATE JURISDICTION

CIVIL APPEAL NO. 61 of 2021

BETWEEN:-

1. THE SPEAKER OF THE NATIONAL ASSEMBLY

Appellant/ Respondent

-and-

1. CHRISTOPHER JONES
2. THE ATTORNEY GENERAL OF GUYANA
3. SARAH BROWNE
4. VIKASH RAMKISSOON

Respondents

BEFORE THEIR HONOURS:
HON. MME YONNETTE CUMMINGS- EDWARDS — CHANCELLOR
HON. MME. DAWN GREGORY - — JUSTICE OF APPEAL
HON. MR. RISHI PERSAUD - — JUSTICE OF APPEAL

APPEARANCES:
Mr. D. Mendes SC, Mr. C. Hackett, Ms. D. Kumar, Ms. R. Clarke, Mr. C. Devonish and Ms. C. Lewis for the Appellants
Mr. R. Forde SC, Mr. S. Pieters for the 1st Respondent.
Mr. M. Narayan, Mr. R. Motilall for the 2nd Respondent.

DATES:
August 17, 2021, July 25, 2022, November 28, 2022, January 26, 2023, July 25, 2023

JUDGMENT OF THE COURT

INTRODUCTION AND BACKGROUND

1. This is a joint appeal against the decision of the Chief Justice (George CJ (ag) delivered on 20th April 2021. The Chief Justice gave judgment in favour of the 1st respondent, Christopher Jones who had sought declarations that the 2nd and 3rd appellants, Sarah Browne and Vikash Ramkissoon were not lawful members of the National Assembly.

2. The appellants were appointed Parliamentary Secretaries by His Excellency the President following the last General Election held in March 2020. By virtue of their appointments they took up 2 seats as non-voting members of the National Assembly.

3. The Chief Justice found that they were not lawful members of the Assembly because their names were on the list of candidates for their political party, the PPP/C, at that election. It was held that since their party had been successful in obtaining seats, they were by virtue of the success of their party's list, elected members of the National Assembly and therefore were not entitled to take up seats reserved for non-elected members or technocrats, that they were only entitled to membership of the Assembly if their names had been extracted by their List Representative for any of the 33 seats allocated to their party following the declaration of the results of the election, and their names had not been so extracted.

4. The provisions of the Constitution which this case involved were mainly Articles 186, 103, 113 and 232 and their effect on the appointments of the 2nd and 3rd appellants. In particular, Articles 186 and 232 fell to be construed.

5. In her conclusions, the Chief Justice followed the earlier decision of Chief Justice Ian Chang in the case of **Desmond Morian v Attorney General of Guyana and Speaker of the National Assembly (2015-HC-DEM-CIV-CM-55, 19th February 2016)**, a decision which was later affirmed by the Court of Appeal (**Attorney General of Guyana and Speaker of the National Assembly v Desmond Morian (Civil Appeal No. 19 of 2016, 23rd January 2020)**.

INTERPRETATION OF THE CONSTITUTIONAL PROVISIONS

6. Article 113(1) provides that the President may appoint Parliamentary Secretaries to assist himself or Ministers in the discharge of their functions. Sub-article (2) states that qualifications for such appointment are regulated by Article 186.

7. Article 186, so far as is material, provides:

    1) Parliamentary Secretaries may be appointed from among persons who are elected members of the National Assembly or are qualified to be elected as such members.
    2) ...
    3) A Parliamentary Secretary who was not an elected member of the Assembly at the time of his or her appointment shall (unless he or she becomes such a member) be a member of the Assembly by virtue of holding the office of Parliamentary Secretary but shall not vote in the Assembly.
    4) The provisions of Article 183 shall apply to the office of a Parliamentary Secretary as they apply to the office of a Minister.

8. Article 103(3) provides that not more than four Ministers and two Parliamentary Secretaries shall be appointed by the President from among persons who are qualified to be elected as members of the National Assembly.

9. In addressing the meaning of "elected" and "qualified to be elected" in Article 186 the Chief Justice observed:

> "...The latter case refers to a situation where a person was not named on the list of candidates for election but was appointed as Parliamentary Secretary. Such a person would therefore become a member of the National Assembly based on her or his appointment. Persons appointed in this category are also referred to [as] non-elected members of the National Assembly."

10. The Chief Justice found that since the appellants were named on a list, they were elected members and could only become members of the National Assembly by extraction from the list and not by appointment as non-elected or non-voting members.

GROUNDS OF APPEAL

11. The grounds of appeal raise the following issues:
    1) Were Articles 186, 232 and the other provisions of the Constitution involved in the case misconstrued?

    2) Were the issues raised in the case of **Attorney General v Desmond Morian** wholly irrelevant and different from the issues raised before the Chief Justice in the instant case?

    3) Was the Chief Justice bound by the Court of Appeal's decision in Attorney General v Desmond Morian and what was the *ratio decideni* of the decision of the Court of Appeal in that case. Further, is the Court of Appeal now bound by its decision **in Desmond Morian?**

    4) Was **Attorney General v Desmond Morian** wrongly decided and should its findings be revisited?

PRELIMINARY ISSUE

12. A preliminary issue was raised by the appellants at the hearing as to the position of the Court of Appeal in this Appeal. The point was taken because it was noted that the Court of Appeal had affirmed the decision of Chang CJ in **Morian's case** only on the procedural question, namely, whether the proceedings had been properly brought in the High Court by motion or should have been brought by way of an election petition.

13. The questions raised in the preliminary point are included in issues 2 and 3, as just summarized in the grounds of appeal.

CONSIDERATION OF THE SUBSTANTIVE ISSUES IN THE APPEAL

Were Articles 186, 232 and the other provisions of the Constitution involved in the case misconstrued?

14. Article 186 (see para. 7 above) specifies the persons who may be appointed as Parliamentary Secretaries. Article 186(1) sets out two categories of persons, namely, elected members of the National Assembly and persons qualified to be elected as such members.

15. Article 232 of the Constitution defines "elected member of the National Assembly" as:

> "any person elected as a member of the National Assembly pursuant to the provisions of paragraph (2) of article 60 or article 160(2);"

16. Article 60 prescribes the electoral system for election of members of the National Assembly. Article 60(2) provides that, subject to Art 160(2), such number of members of the Assembly as are determined by the Assembly shall be elected in accordance with the system of proportional representation.

17. The words in Art 60(2) "such number of members of the National Assembly as determined by the Assembly shall be elected in accordance with the system of proportional representation" refer to the 65 members so determined.

18. Article 160(1) which bears on 160(2) specifies the system of proportional representation for election of members of the Assembly to be that:

    1) Votes shall be cast throughout Guyana in favour of lists of candidates
    2) Each elector shall have one vote to be cast in favour of any of the lists
    3) The said number of seats in the National Assembly shall be allocated between the lists in such a manner that the proportion that the number of such seats bears to the votes cast in favour of that list as nearly as may be the same for each list thus minimizing the level of disproportionality between the percentages of votes earned by lists and the percentages of seats allocated to lists

19. Article 160(2) makes provision for the division of Guyana into geographical constituencies and permits a person to stand as a candidate for election in any such constituency.

20. In **Desmond Morian** Chang CJ reasoned that the term "elected member" in Article 103(2) (relating to the appointment of Ministers and counterpart to Article 186 (1)) referred to a person whose name was included on a list of candidates to which there had been an allocation of seats. The appointed persons in that case were found to be in the "elected" category and not in the "qualified to be elected" category. As elected persons, they were held not to be eligible to take up seats as non-voting members. In the present case, by similar reasoning, the appointees were found not to be entitled to appointment under Article 186(1) and (3) as they were on a list which had obtained seats. Because they were on the list but not extracted and sat in the National Assembly as non-voting Parliamentary Secretaries by appointment, it was observed that:

> "...the end result is that...the 3rd and 4th respondents are now both elected and non-elected members of the National Assembly and this cannot be"

21. The interpretation of "elected member" is criticized by the appellants who contend that the language used in Article 186 should be read as meaning only extracted members and not all members on a list. They distinguish between an elected list and members of that elected list. They contend that there is no provision which in terms makes such persons members of the Assembly or entitles such non-extracted persons to attend Parliamentary sittings, sit in the Assembly, participate in the proceedings or vote.

22. They further contend that the provision for a finite number of members of the Assembly is not consistent with a construction of the Constitution which results in there being a number of elected members far exceeding the number of members of the Assembly envisaged in Article 52 (which provides for composition of the National Assembly of 65 members). They submit (20th September, 2022) that it would make a mockery of the Constitution to designate a person an elected member of the Assembly when he or she is never called upon to serve in that capacity (para. 39).

23. The appellants point to the words of Article 186(3) that "[a] Parliamentary Secretary who was not an elected member of the Assembly at the time of his or her appointment shall (unless he or she becomes such a member) ..." as supporting their eligibility for appointment as Parliamentary Secretaries although they were non-extracted persons. They submitted that since one of the obvious and most usual ways in which a person who is not already an elected member may become an elected member is by extraction from a list in the event of a vacancy, the premise of Article 186(3) is that the appointee is not an elected member when appointed.

24. As to the definition of "elected member of the National Assembly" in Article 232, the appellants submitted that two routes to election were envisaged: Article 60(2) and Article 160(2). In their view, those provisions reference members extracted to take up the 65 seats as being elected members. They noted, for example, the provision in Article 160(1)(c) that the seats in the Assembly shall be allocated between the lists in such a manner that the proportion that the number of seats allocated to each list bears to the number of votes cast in favour of that list. The appellants say that when read with the opening paragraph of Article 160(1) it is clear that this provision is referring to extracted members as comprising the members of the Assembly.

25. Further, pursuant to Article 160(3)(a)(v) by which Parliament had made provision for the extraction from the list of candidates by means of the Representation of the People Act (the RPA). The appellants contend that sections 97, 98 and 99A thereof support the interpretation that an elected member is one who has been extracted from a list of candidates and not simply one whose name was on such a successful list.

26. They pointed out that the interpretation favoured by Chief Justices Chang and George would result in an excessive number of elected members of the National Assembly and highlighted some of the resulting anomalies of the interpretation favoured so far.

27. In answer, the first respondent submitted (31st October, 2022) that there is a distinction between election and extraction. Article 160 (3) (a) (v) makes it clear that extraction is made from the lists of candidates who have been elected. Therefore, the status of a candidate as an elected member of the Assembly necessarily precedes any act of extraction made by the Representative of the list. Further, Article 232 does not refer to Article 160(3) which confirms that extraction from the list is not part of the definition of an elected member under Article 232. Articles 60, 160(2) and 232 separate the election of a member of the National Assembly from the process of extraction from a list of candidates (Para. 20-21).

28. Despite the force of the arguments, it is noteworthy that the meaning of "elected member" in Article 232 of the Constitution was pronounced upon in **Raphael**

Trotman et al v The Attorney General of Guyana HCA 843/SA of **2006/Demerara.** That case determined whether the appointment of Cabinet Ministers before their extraction from their party's list was lawful. These appointments had been made by the then President following the General Election of August 2006. One of the claims was that the President was not entitled to appoint Ministers under Article 103 of the Constitution before their extraction from the list of candidates by the List Representative and before Parliament was convened. It was contended that they were not yet elected members of the National Assembly. The provision under review was Article 103(2):

> "Subject to the provisions of article 101(1) [dealing with the Prime Minister], Vice-Presidents and other Ministers shall be appointed by the President from among persons who are elected members of the National Assembly or ... are qualified to be elected as such members."

29. It fell to be determined, among other issues, whether the Ministers at that stage had been appointed from among persons who were elected members of the National Assembly.

30. This issue was determined on the basis of the meaning of the term in Article 232. Singh CJ (as he then was stated):

> "It is important to note and I wish to emphasize, that the definition of an elected member of the National Assembly as set out in Article 232 of the Constitution, makes absolutely no reference to Section 98 of the Representation of the People Act Cap 1:03 of the Laws of Guyana. The only reference is to Article 60(2) and Article 160(2)."

31. Section 98 of the RPA provides for the extraction by the List Representative of the names of candidates to take up the seats in the National Assembly allocated to that list.

32. After outlining the provisions of Articles 60(2) and 160(2) the Chief Justice stated that these were the only provisions that ought to have any bearing on the interpretation of Article 232 or what was meant by "elected member" in the Constitution and not the provisions of the Representation of the People Act.

33. The decision of Singh CJ was affirmed by a majority of the Court of Appeal in **Raphael Trotman et al v Attorney General Civil Appeal No. 79 of 2006.**

34. Chang CJ had expressed a similar view in **Morian,** as to when a candidate becomes an elected member, where at page 8 he stated:

> It is further clear that members of such successful lists are constitutionally recognised as "elected members" even before the stage of allocation between those successful lists is reached --let alone before extraction (or selection) is made by the representatives of such lists after such allocation of seats between or among the successful lists.

35. Being bound by its own decision in **Raphael Trotman et al v Attorney General Civil Appeal No. 79 of 2006,** this Court must find that "elected member" in Articles 186 and 232 refers to all members on a successful list of candidates and not only to persons extracted to take up seats allocated to that successful list.

36. In light of the interpretation of Singh CJ in **Raphael Trotman v AG**, the decision of Chang CJ in **Morian v AG**, and the respective decisions of the Court of Appeal affirming each of those decisions, this Court affirms the interpretation of George CJ of the term "elected member of the National Assembly" in Articles 186 of the Constitution.

37. However, resolution of the meaning of "elected member" is not by itself determinative of the first issue in this appeal. It must still be resolved whether the key finding that the 2nd and 3rd appellants were not eligible to be appointed as non-voting Parliamentary Secretaries, by virtue of which they became members of the Assembly, was a correct interpretation of Article 186 (1) and (3).

38. Since it is the appellant's contention that they were not elected members as their names had not been extracted from their party's list, it must be determined whether they were in the other category of Parliamentary Secretaries, namely, persons who were "qualified to be elected".

39. In **Desmond Morian**, Chang CJ went on to discuss the meaning of qualified to be elected in Article 103(2) the counterpart to Article 186(1). He noted that those qualifications are specified in Article 53 of the Constitution. It provides:

> "Subject to Article 155 (which relates to allegiance, insanity and other matters), a person shall be qualified for election as a member of the National Assembly if and shall not be so qualified unless, he –
>
> a. Is a citizen of Guyana of the age of eighteen years or upwards; and
> b. Is able to speak and, unless incapacitated by blindness or other physical cause, to read the English language with a degree of proficiency to enable him to take an active part in the proceedings of the Assembly"

40. On this point the first respondent submitted that the only category or class of persons permitted and provided in the Constitution with the authority to sit and not vote in the National Assembly, are persons who were not named on a list of candidates and are appointed Parliamentary Secretaries and Ministers, and by virtue of such appointments are permitted to sit and not vote in the National Assembly. (Para 94)

41. Crucially, Chang CJ reasoned that a person who had already contested the election as a candidate on a successful list was not a person "qualified to be elected" and thereby eligible for appointment as a non-voting member. He held that "qualified to be elected "referred to a person who had not contested the election and who met the requirements of Article 53.

42. In contending that the reasoning of Chang CJ was wrong and led George CJ into error when she found that a person on a list who was not extracted could not be appointed as a non-elected member, the appellants stated that they were presumptively qualified as members on the list. They also submitted at para. 58 that:

> ...the 2nd and 3rd appellants were not elected members of the National Assembly when they were appointed but were eligible to be elected as members of the Assembly. Accordingly, they were lawfully appointed as

Parliamentary Secretaries and in accordance with Article 186(3) and became members of the Assembly without the power to vote.

43. Here again, as outlined above, the phrase in Article 186(3), and its counterpart Article 105 for Ministers, "unless he or she later becomes such [an elected] member", seems to support eligibility for appointment as persons "qualified to be elected" under Article 186. The appellants submitted that only an un-extracted member of a successful list [as they both were] could later become an elected member, that is, if a vacancy arose among the allocated 33 seats. Thus they contend that as persons on a list they properly fell within the category of persons who were qualified to be elected as contemplated by Article 186(3).

44. Chang CJ was of the view that since the Ministers in **Desmond Morian** were elected, this phrase did not refer to them. He said that:

> Such is a possibility if the court later finds that in the case of a regional candidate, he did win his regional seat or wins a regional seat in a regional election which is ordered to be re-run by an order of court.

45. For ease of reference, Article 105 states:

> A Minister who was not an elected member of the Assembly at the time of his or her appointment shall (unless he or she becomes such a member) be a member of the Assembly by virtue of holding the office of Minister but shall not vote in the Assembly.

46. Underlying the appellants' submission, that as non-extracted members of the list, they were "presumptively qualified" and "eligible to be elected" as members of the Assembly seems to be the claim that they were inherently qualified as persons on a successful list to be elected within the meaning of Article 186(3).

47. This is not borne out by the provision dealing with extraction from the list when a vacancy arises. Article 160(3)(a)(vii) of the Constitution states that Parliament may make provisions in this regard. Filling of vacancies is provided for in section 99A of the RPA. In summary, those provisions for filling of vacancies provide that the vacancies shall be filled by the person who is not such an elected member of the Assembly but is qualified for election as, and willing to become, such a member and whose name is taken from the relevant list of candidates by way of further extraction therefrom. (Emphases supplied).

48. This provision seems to indicate that qualification is not inherent in simply being un-extracted on the list. It is a separate feature in the requirements for filling of vacancies in the future under section 99A. On this basis, it cannot be presumed that a candidate on a list qualified to be elected.

49. Importantly, the question still had to be resolved whether having faced the electorate on a list of candidates, a member who remains on the list continues to be qualified to be elected after an election is held. Chang CJ said that that description was intended for persons who had never faced the electorate and this was affirmed by the Court of Appeal.

50. As the situation now stands, as reflected in the decision in **Desmond Morian**, George CJ did not misconstrue Articles 186, 232 and the other related constitutional provisions when she concluded that the 2nd and 3rd appellants were not entitled to be appointed as non-voting Parliamentary Secretaries and thereby become members of the National Assembly. She was in law bound to follow the

decision of the Court of Appeal in **Desmond Morian** if the issues in the two cases were on all fours. This issue is considered next.

Were the issues raised in the case of Attorney General v Desmond Morian wholly irrelevant and different from the issues raised before the Chief Justice in the instant case?

51. In the grounds of appeal, the appellants asserted that the issues raised in the **Morian Case** were wholly irrelevant and different from the issues raised before the hearing judge and as a consequence the hearing judge was not bound thereby.

52. However, at para. 23 of the appellants' submissions filed on 20th September, 2022, they conceded that the decision of Chang CJ in Morian was "plainly on all fours with this case" but they contended that George CJ was not bound to follow the decision in **Morian** because it was not affirmed on its merits by the Court of Appeal. The original ground of appeal will be addressed for the record.

53. **Desmond Morian v Attorney General** concerned the appointment of Messrs. Winston Felix and Keith Scott as Ministers of Government by the former President after the May 2015 national election. Their names were included in the APNU/AFC's list of candidates for election to the National Assembly but had not been extracted to take up any of the 33 seats allocated to their party after the election results had been declared. The Ministers then took up two of the four additional seats provided for non-voting members of the Assembly.

54. Desmond Morian who was a candidate on the PPP/C list of candidates for that election, filed a notice of motion in the High Court challenging the membership of the two Ministers as non-elected members. He alleged that their appointments as non-elected members were in contravention of Articles 60, 103, 105, 160 and 232 of the Constitution.

55. He contended that the combined effect of those provisions was that the two Ministers were elected members of the National Assembly by virtue of their inclusion on their party's list. He contended that the further effect of those provisions was that all persons on the list were elected members once the list was successful at the election. Their party had been successful and had been allocated 33 seats in the Assembly based on the system of proportional representation. According to Mr Morian, although their names had not been extracted for any of the 33 seats allocated, the two Ministers had already been elected as members as part of that list and could not be appointed as non-elected members to take up any of the four additional seats provided for non-elected members or technocrat ministers.

56. By his motion, Desmond Morian sought the following orders:

    1) A declaration that Winston Felix and Keith Scott are not lawful members of and cannot sit in the National Assembly of the 11th Parliament of Guyana.
    2) An Order directing the Speaker to prevent Winston Gordon Felix and Keith Winston Harold Scott from sitting in the National Assembly unless

and until their names are extracted from A Partnership for National Unity and Alliance for Change national top-up list

57. Chief Justice Chang upheld the challenge finding that the relevant provisions did not allow the Ministers who were elected members to take up seats as non-elected members. The substantive findings made by Chief Justice Chang are set out below at paragraph 68.

58. The provisions which fell for interpretation in relation to the Ministers' membership in the National Assembly as non-voting members will be restated for ease of reference:
    a) Article 103(2) - Subject to the provisions of article 101(1), Vice-Presidents and other Ministers shall be appointed by the President from among persons who are elected members of the National Assembly or ... are qualified to be elected as such members.
    b) Article 103 (3) - Not more than four Ministers and two Parliamentary Secretaries shall be appointed by the President from among persons who are qualified to be elected as members of the National Assembly.
    c) Article 105 – A Minister who was not an elected member of the Assembly at the time of his or her appointment shall (unless he or she becomes such a member) be a member of the Assembly by virtue of holding the office of Minister but shall not vote in the Assembly.

59. The definition of "elected member" of the National Assembly in Article 232 of the constitution was referenced to determine the meaning of the term in these provisions.

60. By Notice of Appeal dated 24th February 2016, the Attorney General on behalf of the Ministers, complained, among other grounds, that the decision and declarations of the Chang CJ should be set aside because:
    1. Chang CJ erred in law when he found that persons who are on the successful list of candidates are elected and therefore cannot qualify under Article 105 to be a "non-elected" member of Parliament and who have not been chosen or selected from the list of candidates to be members of Parliament are excluded from being selected by the President as persons who are qualified to be elected as members of the National Assembly.

    2. Chang CJ failed to take into consideration the provisions of the Representation of the People Act, Cap 1:03 and the National Assembly (Validity of Elections Act), Cap 1:04.

    3. The Chief Justice failed to take into account the National Assembly (Validity of Elections) Act Cap 1:04 (enacted by the Parliament under Article 163(4)(a) of the Constitution) which contained the procedure for determining such questions as arose in that case.

61. Although, they appealed his interpretation and findings on the substantive issues the appellants did not pursue those grounds but instead confined their arguments to the procedural point, mainly ground three above. However, the respondent, Desmond Morian, did provide submissions on both the procedural and substantive grounds to the Court of Appeal similar to those made in the High Court.

62. This Court confirms that the case of **Desmond Morian** is on all fours with the case at bar inasmuch as the facts and circumstances of that case relating to the appointment of Ministers were the same as those relating to the appointment of the appellants as Parliamentary Secretaries in this case.

63. This is evident in the following provisions:

1) Article 103(2) which provides for the appointment of Ministers is identical to Article 186(1) which provides for the appointment of Parliamentary Secretaries.
2) Article 105 which provides for non-voting Ministers to sit in the Assembly is in the same terms as Article 186(3) which provides for non-voting Parliamentary Secretaries to sit in the Assembly.
3) Article 183 which provides that the tenure of Ministers applies to the office of Parliamentary Secretaries by virtue of Article 186(4).

Whether the Chief Justice was bound by the Court of Appeal's decision in Attorney General v Desmond Morian and what was the ratio decidendi of the decision of the Court of Appeal in that case; Further, is the Court of Appeal now bound by its decision in Desmond Morian.

64. It was submitted that George CJ was not bound by the **Morian** case on the ground that the Court of Appeal had not affirmed the decision of Chang CJ on its merits, having only heard oral arguments on the procedural question, i.e. whether the proceedings had been properly brought before the High Court by Motion or should have been brought by way of election petition.

65. The transcripts of the judgments delivered in Morian confirm that the entire decision of the Chief Justice was affirmed on the footing that the appellants had conceded that the Chief Justice's findings were correct since they had not argued against them. Holder J stated:

> Further, since the only ground argued before this Court, and for which skeletal submissions were received, challenged the procedure...invoked. It is reasonable to conclude because the grounds were not withdrawn, that the Appellants have conceded to the respondents' challenge to the Ministers' appointment and the decision of the learned Chief Justice Ian Chang must be affirmed.

66. Gregory JA stated:

> Although the grounds of appeal challenged the substantive findings of the Chief Justice, as well as the procedure utilized in approaching the High Court, at the hearing the arguments on behalf of the Appellant, were not ... no arguments were put forward against the substantive findings of the Chief Justice as to the effect of those specific provisions of the Constitution which related to the Ministers' appointment as Members of the Assembly. The arguments were directed only to the issue of the jurisdiction of the High Court to entertain the constitutional motion given the nature of the orders sought...
>
> ...However, in light of the broader substantive issues which were raised in the grounds of appeal but which were not argued, I would uphold the findings of the Chief Justice on those substantive issues as contained in his judgment.

67. The appellants in the present case contend that since the substantive issues were not argued before the Court of Appeal, this Court is not bound by its decision in **Desmond Morian** nor could Chief Justice George have been so bound on the merits. They contend that this Court now has the jurisdiction to review and possibly overrule the substantive findings of both Chief Justices George and Chang.

68. This court takes the position that by its affirmation, the Court upheld the substantive conclusions of Chang CJ as laid out at pages 12 and 13 of his judgment as follows, and wherein can be found the *ratio decidendi*:
    1) Declaration that Winston Felix and Keith Scott were elected members of the National Assembly
    2) Declaration that despite their status as elected members of the National Assembly, Winston Felix and Keith Scott did not hold seats and could not sit in the National Assembly since their names were not among those extracted from the APNU+AFC list of candidates to hold seats on behalf of the persons named in that successful list.
    3) Declaration that Article 105 of the Constitution has no application to elected members of the National Assembly i.e. persons whose names were on a successful list of candidates i.e. Winston Felix and Keith Scott
    4) Declaration that despite their appointment by the President to be executive members of the Government, such an executive appointment did not entitle them to hold seats or sit as members of the National Assembly.

69. The principle of *stare decisis* governing binding precedent of decisions in the hierarchy of Courts, as applied in the United Kingdom, applies in Guyana. The principle was discussed by the House of Lord in **Cassell and Co Ltd v Broome [1972] UKHL 1054**. In delivering the decision of the House, His Lordship Lord Hailsham LC stated at page 1054:

> "...in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept...the decisions of the higher tiers. Where decisions manifestly conflict, the decision in Young v. Bristol Aeroplane Company [1944] K.B. 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously."

70. George CJ was therefore correct when she felt herself bound by the decision of the Court of Appeal in **Desmond Morian** having applied the principle in **Cassell v Broome**.

71. It is further suggested that the Court of Appeal should not consider itself bound by its own decision in **Desmond Morian**. This proposition is inspired by the criticisms made against Chang CJ's conclusions as well as the absence of express reasons of its own on the merits.

72. When a Court should not consider itself bound by a previous decision was considered in **Young v Bristol Aeroplane Company Limited [1944] KB 718** in which the English Court of Appeal stated at p **723** that:

> "Cases in which this court has expressed its regret at finding itself bound by previous decisions of its own and has stated in the clearest terms that the only remedy of the unsuccessful party is to appeal to the House of Lords are within the recollection of all of us and numerous examples are to be found in the reports. When in such cases the matter has been carried to the House of Lords it has never, so far as we know, been suggested by the House that this view was wrong and that this court could itself have done justice by declining to follow a previous decision of its own which it considered to be erroneous. On the contrary, the House has, so far as we are aware, invariably assumed and in many cases expressly stated that this court was bound by its own previous decision to act as it did."

73. The position was summarized in the headnote of that case as follows:

> "The court of appeal is bound to follow its own decisions and those of Courts of co-ordinate jurisdiction... The only exceptions to this rule are:- (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2) the court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the house of Lords; (3) the court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam, e.g. where a statute or a rule having statutory effect which would have affected the decision was not brought to the attention of the earlier court."

74. None of the exceptions highlighted in **Young v Bristol Aeroplane Company Limited v Attorney General** was at that time the only known precedent on the meaning of the term "elected member" in Article 232, and **Desmond Morian case** accorded with **Raphael Trotman's case** on the meaning placed on the term.

75. As to the argument that the Court of Appeal did not give reasons for affirming Chang CJ's decision in **Morian** on its merits and therefore, did not produce a binding decision in **Morian** on the merits, the 1st respondent cited the case of **Kunhayammaed and ors v State of Kerala (2000) 6 SCC 356, AIR 2000 SC 2587,** in which the Supreme Court of India referred to its statement in **Commissioner of Income Tax, Bombay VM/S Amritlal Bhogilal and Co AIR 1958 SC 868** where it had stated that:

> There can be no doubt that, if an appeal is provided against an order passed by a tribunal, the decision of the appellate authority is the operative decision in law. If the Appellate authority modifies or reverses the decision of the tribunal, it is obvious that it is the Appellate decision that is effective and can be enforced. In law, the position would be just the same even if the Appellate decision merely confirms the decision of the tribunal. As a result of the confirmation or affirmance of the decision of the tribunal by the appeallate authority the original decision merges in the Appellate decision and it is the Appellate decision alone which subsists and is operative and capable of enforcement.

76. It is instructive that in **Raphael Trotman** this Court affirmed the decision of Singh CJ after discussing at some length the procedural issue, namely, whether the matter had properly proceeded by originating summons utilizing O 42 r 2 of the Rules of the Supreme Court 1955, having regard to the constitutional reliefs which were sought in that case. This Court did not review the meaning of the term "elected member of the National Assembly" in Article 232. The decision of the

Chief Justice was affirmed by majority without reasons being expressed on that issue. In a dissenting judgment, Cummings JA (as she then was) discussed the substantive issues, among which was the meaning of the term "elected member" in Article 232.

77. In written submissions made to this Court in **Morian** (which were not pursued) his Counsel cited and attached the judgment of Singh CJ in **Raphael Trotman** without any mention that it was not binding, in that, it had not been affirmed on its merits on appeal. On the authority of that decision it was submitted that:

    1) The Constitution is the supreme law and it would therefore be impermissible to use ordinary law, such as the Representation of the People Act or any of its provisions, to interpret or colour any provision of the Constitution.

    2) A person who was on a list of candidates that won a seat in the Parliament and who is therefore "an elected member of the National Assembly, cannot become a technocrat Minister and hold a seat in the National Assembly under Articles 103(3) and 105.

    The Case was cited as authority that the Ministers were elected members of the National Assembly when they were appointed.

78. It is further demonstrated in paragraphs 28 – 33 of the current judgment that the decision of Singh CJ has been considered on its merits. The contention that the decision of the Court of Appeal in **Desmond Morian** is not binding as reasons were not given on the merits must therefore be rejected.

Whether Attorney General v Desmond Morian was wrongly decided and ought to be revisited

79. This Court recognizes, applying the principles in **Young v Bristol Aeroplane Company Limited** that it would be for the Caribbean Court of Justice to correct any errors in the case of **Desmond Morian** if an appeal in this matter is taken to the higher Court.

80. However, this Court, by way of *obiter dicta*, agrees that there will be some difficulty in the scope so far given to the term "elected member of the National Assembly" in Article 232 of the Constitution in some situations. This difficulty can be seen, for example, when this interpretation is applied to the meaning of the term in Article 106 (6).

81. The wider interpretation, that the term includes all members on the list, does result, as pointed out by the appellants, in a large pool or cadre of elected members who would never have entered the Assembly or taken part in its proceedings. Such a possibility perhaps could affect the operation of Article 106(6) whereby a large pool of elected members may fall to be taken into account. On the other hand, it should be noted that by providing for a vote, Article 106(6) is directed at only voting members of the Assembly but the difficulty cannot be denied.

82. In defining various terms used in the Constitution including "elected member of the National Assembly" Article 232 makes exception for interpretation as

required by the context. It may be that in the application of some provisions in the Constitution the more restricted interpretation of the term may be appropriate.

83. Article 186 differentiates between the Parliamentary Secretaries who are appointed from elected (extracted) members who can vote and those who are not elected and not entitled to vote. Article 103(3) limits the latter category of Parliamentary Secretaries to two appointees. The thrust of Article 186(3) seems to be to circumscribe the difference in the voting power of the two categories. In this context it is reasonable to interpret "elected member" as an extracted voting member of the Assembly rather than all the members on a successful list.

84. Further, as discussed earlier in the judgment, a difficulty arises with the wider interpretation of elected member with the provision in Article 186(3) and Article 105(relating to Ministers). The meaning of the phrase "unless he or she becomes such a member" referring to a Parliamentary Secretary/ Minister who was not an elected member at the time of appointment is ambiguous.

85. There is merit in the appellant's submission that in the context of Article 186, the wider interpretation of elected member creates a difficulty. However, even if the term "elected member" is to be interpreted as meaning only extracted member and not all members of a successful list, resolution of the meaning of "elected member" would not be determinative of the outcome of this appeal. It must be borne in mind that the appellant's contention is that they were not elected members in any event.

86. The key issue in this appeal is whether the interpretation of Articles 186 (1) and (3) and the consequent finding that the appellants were not eligible to become non-voting Parliamentary Secretaries was correct.

87. Notwithstanding the issues revolving around the meaning of elected member, the main difficulty in the current case arises when the meaning of "qualified to be elected" in Article 186 and 103 is considered.

88. That question involves whether the remaining, non-extracted members of a successful list are to be regarded as persons who are qualified to be elected, in the context of Article 186 [and 103]. Having regard to the definition of qualified member in Article 53, do persons on a successful list who have already contested the election assume the status of qualified to be elected and eligible for appointment to the Assembly thereafter as non-voting members? It is not disputed that, in the event of a vacancy arising among the allocated seats, that such vacancy is to be later filled from persons on that list. But without a clear provision enabling this, could it be said that remaining members are eligible for appointment as occurred in this case and **Desmond Morian**?

89. The nub of the controversy in the present case, as it was in **Desmond Morian**, is whether the power of appointment to the National Assembly can enable additional seats in the Assembly to be given to a list which has successfully contested the election. More particularly, would membership of the National Assembly by executive appointment, in such circumstances, not override the power of the electorate which has already determined the proportion of seats to be taken in the Assembly by successful lists?

90. The principle of proportional representation at the center of the electoral system is made clear in Article 160 (1)(c) where it is stated that:

> The seats of the said elected members in the Assembly,...shall be allocated between the lists in such a manner that the proportion that the number of such seats allocated to each list bears to the number of votes cast in favour of that list is as nearly as may be the same for each list, thus minimizing the level of disproportionality between the percentages of votes earned by lists and the percentages of seats allocated to lists in the cases of individual geographical constituencies, if they exist, and of the Assembly taken as a whole. (Emphasis supplied)

91. The interpretation favoured by Chang CJ and affirmed by the Court of Appeal and followed by George CJ seems to be more closely aligned with the core principle of proportional representation. According to the interpretation favoured by Chang CJ and George CJ, qualified members would come from a separate pool of eligible persons who did not contest the election but met the requirements for membership of the Assembly as set out in Article 53.

92. For the reasons outlined above, we are of the view that the interpretation adopted in **Desmond Morian** on this important aspect is correct.

CONCLUSION

93. The appeal is dismissed. The decision of the Chief Justice George (ag.) is affirmed.

94. It is ordered that the 2nd and 3rd appellants are not lawful members of the National Assembly, as their names appeared on their party's list of candidates for the election held in March 2020, and their names were not among the 33 names of persons extracted to take up seats in the National Assembly. As such they are not eligible to take up seats as non–voting members of the Assembly by executive appointment as Parliamentary Secretaries. Since the 2nd and 3rd appellants' membership of the National Assembly came about by virtue of such executive appointment while they were members on a successful list, their appointments as Parliamentary Secretaries are hereby held to be unlawful.

95. Costs to the 1st respondent to be taxed fit for one senior counsel and one junior counsel.

COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

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Dawn Gregory

Justice of Appeal

Dated 25th July, 2023