CASE NO SC/CIV/07/23

IN THE SUPREME COURT
OF THE FALKLAND ISLANDS

Courts and Tribunal Service
Stanley
Falkland Islands

Date: 12th December 2023

Before:

THE HONOURABLE JAMES LEWIS KC
(CHIEF JUSTICE OF THE FALKLAND ISLANDS)

- -

BETWEEN:

THE ATTORNEY GENERAL FOR THE FALKLAND ISLANDS

Petitioner

-and-

MS TESLYN SIOBHAN BARKMAN

Respondent

- -

Judgment

- -

Richard Price OBE KC with Iulia Saran for the Petitioner, instructed by the Attorney General.

Gerard Rothschild for the Respondent.

LEWIS C.J.

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I. INTRODUCTION

1. This is a Petition by the Attorney General seeking a determination by the Supreme Court pursuant to section 36 of the Schedule to the Falkland Islands Constitution Order 2008 ("the 2008 Constitution") that the Respondent has vacated her seat on the Legislative Assembly. It raises an issue under the 2008 Constitution of importance.

II. BACKGROUND

2. The Respondent was born in the Falkland Islands in 1987. She has had full Falkland Islands status from birth and is a seventh-generation Falkland Islander. She has lived in

the Falkland Islands continuously since the age of two, except for a few years to undertake further education in the UK.

3. The Respondent was first elected to the Legislative Assembly on 9th November 2017 and re-elected on the 4th November 2021. The Respondent has pledged her allegiance to our Monarch, by the formal affirmation of allegiance upon becoming a Member of the Legislative Assembly, as well as at the King's Coronation on 6th May 2023.

4. She has also made the affirmation of due execution of office, namely that she will:

> "well and truly serve Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, and the people of the Falkland Islands, and will uphold the Constitution and other laws in force in the Falkland Islands, in the office of member of the Legislative Assembly, Falkland Islands."

5. The Respondent's biological father, who was employed by the Falkland Islands Company in the 1980s, is a New Zealand citizen by birth. Under New Zealand law, the Respondent has therefore automatically been considered a New Zealand citizen by descent since her birth.

6. In November 2021 the Respondent filled in a New Zealand application for registration and passport by descent through her father. The certificate of registration was issued on 4th December 2021. The passport was issued on 7th December 2021. She has never used or travelled on this New Zealand passport.

7. On 28th April 2023 the Respondent was removed from the register of electors and added to the disqualification list. On the 25th May 2023 the Attorney General issued this Vacation Petition.

III. ISSUE

8. It is a provision of the 2008 Constitution that no person shall be qualified to be elected as a member of the Legislative Assembly who is, by virtue of his or her own act, under any acknowledgment of allegiance, obedience or adherence to a foreign Power or State. It is common ground that dual nationality of itself is not a disqualification under the provision.

9. The Attorney General asserts that Ms Barkman by applying for registration and passport by descent through her father, confirming she was a New Zealand citizen and entitled to a New Zealand Passport, is under such acknowledgment of allegiance, obedience or

adherence to New Zealand, which he asserts is a foreign State, and therefore disqualified from holding office.

10. Ms Barkman, on the other hand, says that the mere acts of registering her New Zealand citizenship by descent and applying for a passport, are not acts that amount to such acknowledgment to warrant disqualification under the provision. To the extent that the she has any responsibilities towards New Zealand, these were incidents of her citizenship by descent which were applicable from the time of her birth in 1987, not imposed by the certificate of registration or passport issued in 2021. Further, it is not accepted that New Zealand is a foreign State in the context of the provision.

11. As I explain below, this involves the context of New Zealand citizenship. It therefore falls to this court to determine, on a true construction of the constitutional provision, and considering the expert evidence of New Zealand law, whether those acts of the Respondent disqualify her from holding office.

12. A further issue raised by the Petitioner to strike out the "Fundamental Rights and Freedoms Case" raised by the Respondent in her Defence and Counterclaim pleading was stayed pending the determination of the issue outlined above. For the reasons set out below, and as a result of the dismissal of this Petition, this Fundamental Rights and Freedoms Case issue has become otiose.

IV. THE LEGISLATIVE PROVISIONS

13. The provision that is engaged is section 29(1) of the 2008 Constitution. It reads:

> "29.—(1) No person shall be qualified to be elected as a member of the Legislative Assembly who—
> (a) is, by virtue of his or her own act, under any acknowledgement of allegiance, obedience or adherence to a foreign Power or State;"

14. Section 30 reads:

> "30.—(1) The seat of an elected member of the Legislative Assembly shall become vacant—
> …
> 2 (e) if any circumstances arise that, if he or she were not a member of the Legislative Assembly, would cause him or her to be disqualified for election to the Assembly by virtue of paragraph (a), (b), (c), (d), (e), (g) or (h) of section 29(1); …"

15. Section 32 is also informative as it disqualifies any person from being an elector, regardless of nationality or Falkland Islands status, under an identically worded provision:

> "32(2) No person shall be qualified to be registered as an elector under this section who on the qualifying date –
> …
> (e) is, by virtue of his or her own act, under any acknowledgement of allegiance, obedience or adherence to a foreign Power or State;"

16. It was under this provision, on the same facts as cited above, that the Respondent was removed from the electoral register.

V. THE EVIDENCE

A. Simon Young

17. The evidence of Simon Young, the Attorney General, was adduced by affidavit. He said:

> "4. The issue of what circumstances might or might not give rise to a member of the Legislative Assembly vacating their seat or a person being disqualified from registering as an elector was first raised with me in 2018, following an enquiry from an elector. I was asked to prepare a "one page" note, and subsequently to brief the members of the Legislative Assembly about that issue. A copy of my note is at exhibit SY1. MLA Teslyn Barkman was present at the briefing, which was held on 27 March 2018. An extract of the notes of the meeting is at exhibit SY2. In terms of the follow-up points, the elector concerned was informed; no alternative action was proposed and there was no follow-up; and the Select Committee did not complete its review of the Constitution, though no-one made any representations suggesting change to the provisions in relation to this disqualification provision.
> 5. In around July 2022, it was drawn to my attention that the Respondent had previously placed a post on Facebook which indicated that she was a New Zealand citizen. After considering the potential implications of this fact, I asked a colleague if they could search for the Facebook post, and I obtained a screenshot of the post, which is exhibited at SY3. The picture within the post included a partial shot of a "Certificate of Citizenship", and the cover of a New Zealand passport. I also looked at the parts of the New Zealand Government website dealing with citizenship, including the rights and responsibilities of citizens.
> …
> 10. I believe that: a) New Zealand is a foreign Power or State within the meaning of the Constitution; b) applying to register her New Zealand citizenship by descent (the right to do which the Respondent has had from birth), and/or the obtaining of a New Zealand passport are acts taken by the Respondent; and c) those acts place the Respondent under an acknowledgment of allegiance obedience or adherence to New Zealand."

18. Exhibit SY1 is the note for the meeting on 27th March 2018 prepared on 23rd March 2018. In the note, the Attorney General gave somewhat ambiguous advice. It said:

> "7. There is a provision in identical terms in section 29(1) in relation to disqualification for election as a MLA. It provides that: "No person shall be qualified to be elected as a member of the Legislative Assembly who- (a) is, by virtue of his or her own act, under any acknowledgment of allegiance, obedience or adherence to a foreign Power or State."
> 8. The Australian provisions are different in that they do not refer to "his or her own act", and also specifically disqualify those who are citizens of another state. In Australia

therefore, dual nationals are specifically disqualified for election to Parliament; in the Falkland Islands, the position is different.
9. The critical questions are: a. What constitutes "his or her own act"? b. What constitutes an "acknowledgment of allegiance, obedience or adherence"? and c. What constitutes a "foreign Power or State"?
10. It is normal that anyone taking up citizenship of a State will in some way be required to swear allegiance to that State. Anyone obtaining Falkland Islands Status, for example, is required to do so.
11. It is therefore possible that anyone who have acquired or taken up dual nationality **after** they have acquired Falkland Island Status (from birth or immigration), **might** be disqualified from being an elector or holding office here. It will not likely affect anyone who has a **right** to become a citizen of another State, only those who have actively done something to activate that right. For example, it has generally been the case that anyone born in the United States of America is entitled to become a citizen and obtain a US passport. If an individual has taken up that opportunity, they might be disqualified from being an elector here." [Emphasis in original]

19. In the meeting a few days later at Gilbert House, on 27th March 2018, where both the Petitioner and Respondent were in attendance the minutes record the Attorney General's contribution as follows:

> "AG explained that a query has been raised about eligibility status on the current canvas form for those residents with dual nationality. AG advised that electors who hold dual nationality are not directly barred from being on the register but thought does need to be given about what 'acknowledgement of allegiance, obedience or adherence to the following power' means and which state could cause to be excluded from registering as an Fl elector. AG also advised that those who hold Fl status who have since taken up dual nationality with another state may find themselves not being eligible as an elector. The Registrar General has been instructed to continue accepting the signed canvas forms but consideration does need to be given to what circumstance someone might be disqualified from being an elector."

B. Teslyn Barkman

20. The evidence of the Respondent was set out in an affirmation and she was cross examined by Mr Price KC. In her affirmation she said:

> "4. I was born on 17 November 1987 in the Falkland Islands. I have full Falkland Islands status from birth.
> 5. I am a seventh-generation Falkland Islander. My son is an eighth-generation Falkland Islander. My mother, Margaret Battersby, is a Falkland Islands citizen by birth. We can trace our family history back to James and Margaret Biggs, who arrived in the Falkland Islands on 15 January 1842.
> 6. My biological father, Trevor Barkman, is a New Zealand citizen by birth. He came to the Falkland Islands in 1983/4, employed by the Falkland Islands Company (FIC) as a shepherd alongside several others in order to introduce New Zealand practices to farming at FIC farms.
> …
> 8. The Falkland Islands are my home, not just a place where I live. My only home is here. My son was born here on 22 June 2016.

9. I am a loyal Falkland Islander. I believe that this is demonstrated by my public service and my career.

…

12. My loyalty is further demonstrated by the oaths/affirmations of allegiance which I took upon becoming a Member of the Legislative Assembly, as well as at His Majesty's Coronation on 6 May 2023.

13. I obtained my first individual British passport in 1999. I have been aware since around the age of nine that I am a dual citizen by virtue of having a New Zealander father. I do not see any incompatibility or inconsistency with my loyalty to the Falkland Islands as this is and will always be my home. New Zealand is a friendly Commonwealth country with the same Head of State. New Zealanders are even eligible to serve in the Falklands Defence Force. I have never considered that my birth to a New Zealander father makes me any less British or less loyal to my country, the Falkland Islands.

…

16… There was never a thought that this would oblige me to New Zealand or that I would be under any allegiance to that country. I certainly never contemplated that holding two passports might remove my right to vote in my own country, or to be an MLA, or cause me to be a Falkland Islander without full rights. The annual canvass form for the Falklands electoral roll does not state that two passports or more are a basis for removing voting rights.

…

21. I was not required to make, and have never made, an oath or affirmation of allegiance to New Zealand.

22. I am not registered to vote in New Zealand.

23. I have never paid tax in New Zealand.

24. I have never used the new passport.

…

33.The Falkland Islands Government appears to be reluctant to ascertain how many people would lose their right to vote in their country if the Attorney General's interpretation of the words of the Constitution which underlie this Petition were upheld. Similarly, the Government has been reluctant to properly inform our country of who may be affected.

34. I know that there are a large number of dual nationals in the Falkland Islands who are currently on the electoral roll. I am aware of this because many of them have made representations to me. They have done so privately because they are concerned that their voting rights and access to the travel credits scheme will be withdrawn if they identify themselves publicly.

35. If this Petition succeeds, both they and I will have no say in the democracy of our country. I was not (and I assume the others were not) told of that risk by the Government before applying for or renewing a second passport for which we were eligible.

…

37. If the Petition were to succeed, I would no longer be able to speak as an MLA for my constituents domestically or for my country in international fora. My freedom of expression via the Legislative Assembly and at the ballot box would be less than that of other Falkland Islanders in the eyes of my own country's Constitution. I would have to watch my country being run by only 'pure' British people. My Falkland Islands Status would become that of a lesser class citizen to those who have Status and only British parents and only a British passport. Yet I am a loyal seventh-generation Falkland Islander and the Falkland Islands are my home. I would be discriminated against by virtue of a happenstance of my birth which gave me access to a second passport which I have never even used."

21. In cross examination she said she had not thought for a moment she was putting herself under an acknowledgement of allegiance to New Zealand by recognising her citizenship

by descent or applying for a New Zealand passport. She said after the discussion in 2018 there was no further advice and no-one raised the issue. She was obviously a truthful witness.

22. In her written answers to the Attorney General (SY5) she had said:

> "The application for New Zealand citizenship by descent highlighted no obligations of citizenship that I am under, nor did it require me to affirm or declare allegiance of any sort. New Zealand Citizenship by Descent can be upgraded to Citizenship by grant which secures benefits to my son and myself but requires 5 years residency in New Zealand. I had no prior knowledge that recognising my dual citizenship would cause an issue. New Zealand also allows for dual passports to be held and I was aware that the UK system is the same, and that this has no bearing on voting rights in those countries."

C. The experts

23. I heard evidence of New Zealand law from two experts. The Honourable Christopher Finlayson KC on behalf of the Petitioner and Mr Ben Keith, barrister, on behalf of the Respondent. Both experts were well qualified. Mr Finlayson KC was admitted to the Bar in early 1981 and was the Attorney General of New Zealand between 2008 and 2017. Mr Keith was admitted in 1998 and has served as the Deputy Inspector General of Intelligence and Security. They both have experience in constitutional law.

24. In accordance with the Court's directions a joint report was prepared identifying on what points the experts were agreed, and on what points they were not agreed. In so far as the agreed points were concerned, both experts accepted:

25. First, as to the steps taken by the Respondent:

> "(a) The rights of a citizen by descent arise, under that law, at birth; and (b) The steps taken – that is, obtaining a certificate of citizenship and a passport – are expressed by law to occur as of right, consequent on that status; (c) There is no requirement, in taking either of those steps, to expressly pledge loyalty to New Zealand. As below, the experts disagree as to whether those steps involve an implicit pledge of loyalty; and (d) The practical effect of those steps is to facilitate the exercise of rights of citizenship."

26. Second, as to the obligations of citizenship:

> "(a) New Zealand law does not impose general obligations upon citizens or, unlike some jurisdictions, require undivided loyalty to New Zealand as a consequence of citizenship. In particular: (i) Citizenship is held, and may be exercised, as of right; and (ii) There is no objection to dual citizenship under New Zealand law, with one exception: if a Member of Parliament takes steps to acquire dual citizenship while in office, that does trigger vacation of that Member's seat, because an overt action of that nature is regarded as incompatible in law with continued membership of the House unless that membership is reconfirmed by electors: such Members can be reelected notwithstanding that dual citizenship. (b) The experts agree that a citizen is subject to the few legal obligations engaged by citizenship.

In particular, the description of responsibilities of citizens set out on the New Zealand government website page is not accurate, so far as it is a statement of law: (i) Citizens are not subject to any general obligation not to act in a way that is against the interests of New Zealand. However, under s.16 of the Citizenship Act 1977, a person may be deprived of their New Zealand citizenship if they voluntarily exercise any of the privileges or perform any of the duties of another nationality or citizenship they possess in a manner that is contrary to the interests of New Zealand. So far as the experts can ascertain, s 16 has not ever been invoked but would fall to be applied consistently with civil and political rights. (ii) Citizens are not required to register on the electoral roll, unless they are also physically present in or regularly spend time in New Zealand; (iii) Citizens are not required to pay tax under New Zealand law, unless they are also resident in or otherwise connected to New Zealand in a qualifying way; (iv) Citizens are not required "to behave as a responsible New Zealander"; and (v) Citizens are not required to promote New Zealand law."

27. In so far as the points on which they were not agreed:

28. Mr Finlayson's opinion is that:

> "(a) Under New Zealand law, those that possess the status of citizenship have equal rights and obligations. This is because the state's duty of protection and the citizen's duty of allegiance are correlative.
> (b) Further, all citizens have the same rights and obligations as a result of their citizenship.
> (c) To suggest that citizens do not have an obligation of allegiance, obedience or adherence to New Zealand would render the concept of NZ citizenship meaningless, and would place New Zealand law at odds with all relevant comparator jurisdictions. It is also not a suggestion grounded in the law of New Zealand.
> (d) The respondent, by taking positive acts to acknowledge her New Zealand citizenship rights, was deemed in law to have acknowledged the concomitant obligation of fidelity or allegiance to New Zealand.
> (e) Finally, Mr Finlayson considers that the Falkland Islands are a power foreign to New Zealand. The two states are vested with independent international legal personalities, with separate and distinct laws relating to citizenship and their citizens owe different allegiances, that is, respectively, to the sovereign in right of the Falkland Islands and to the sovereign in right of New Zealand."

29. Mr Keith's opinion is that:

> "(a) It is not correct to state that New Zealand law imposes equal rights and obligations upon all citizens on the basis that the state's duty of protection and the citizen's duty of allegiance are correlative. The duties of citizenship are narrowly framed: - New Zealand citizens who reside in New Zealand are subject to a range of significant obligations, but by reason of that residence. The same obligations – including those perhaps conventionally associated with citizenship, such as the obligation to enrol to vote – apply to non-citizens with permanent resident status; and - by contrast, citizens who do not reside in New Zealand are by law subject only to the particular obligations given above.
> (b) It is also not correct that New Zealand law imposes equal rights and obligations upon citizens, regardless of the grounds on which citizenship is held. As set out in the report, citizenship by birth or descent is held as of right and requires no profession of or assessment of allegiance: citizenship by grant is by law subject to stringent conditions, including the administration of an oath of allegiance.
> (c) It is not correct to suggest that, absent an obligation of allegiance, obedience or adherence, citizenship is thereby meaningless. To the contrary: - New Zealand law confers significant rights upon citizens, but – under New Zealand law – the obligations of citizenship are limited to those set out above;

(d) He does not consider that a citizen who acquires a certificate of citizenship or passport is deemed in law to have acknowledged a concomitant obligation of fidelity or allegiance to New Zealand: the statutory procedures that govern those steps operate as of right, without any profession of fidelity or allegiance by the citizen or any condition or determination to that effect by the New Zealand government; - Citizens are not subject to a legal obligation of fidelity or allegiance under New Zealand law."

30. Both experts were subject to cross examination. It emerged from the evidence of Mr Finlayson that he stuck to reliance on *Dabdoub v Vaz* (2009) 75 WIR 357 and its reliance on *Joyce v DPP* [1946] AC 347 notwithstanding he had read the critique of Smellie CJ in *Hewitt v Rivers* [2013] (2) CILR 262 but did not explain in his opinion why *Hewitt* should be distinguished in New Zealand law.

31. Mr Keith was cross examined by Mr Price KC. He did not budge from the position that while New Zealand granted rights to its citizens there was no concomitant duty placed on the citizen as a matter of New Zealand law. He justified the lack of reciprocity by stating that the only duties that could be imposed were statutory and there were no statutory duties of allegiance required other than for a few extra-territorial crimes.

VI. SUBMISSIONS OF THE PARTIES

A. The Petitioner

32. Mr Price KC submitted that the ordinary meaning of the words contained in the disqualification provisions, is plain, as is their legislative purpose. They are meant to ensure that those who take a voluntary step to recognise a foreign citizenship are not qualified for election so that they do not have, nor appear to have, split or divided loyalties or conflicted interests.

33. He submitted that the framers of the constitutional amendments adopted since 1985 demonstrate a consistent shift to narrow the entitlement of persons to register to vote, and therefore, to stand for election. That the framers of the Constitution may have been concerned here too with the risk of divided loyalties likely to be fostered by a foreign citizenship acquired by descent. Further, he argued that the Court is entitled to assume that, if the framers of the Constitution had intended for those who acknowledge their foreign citizenship by descent to be excluded from that disqualification, then that exclusion would have been marked appropriately. It was not.

34. This effectively meant, Mr Price KC submitted, a literal interpretation of the provision is required as there is no ambiguity. Further if the Petitioner's interpretation leads to a result which is no longer considered desirable, then it would be for His Majesty in Council to amend the Constitution to that effect (s.11 of the Falkland Islands Constitution Order 2008).

35. Mr Price KC further submitted that New Zealand is a foreign Power or State as the crucial distinction is that in New Zealand: the Sovereign is His Majesty in right of his Government in New Zealand. Allegiance is due to the King by his subjects in his political, and not his personal capacity. The same was recognised in *R v Foreign Secretary, Ex parte Indian Association* [1982] QB 892. In short, submitted Mr Price KC, New Zealand is a foreign state to the Falkland Islands because New Zealand and the Falkland Islands have different and independent legislative, judicial and executive bodies.

36. He says the case of *Hewett v Rivers* should be distinguished or it was wrongly decided. Intention is not material to the decision of whether a person is under an acknowledgment of allegiance, obedience or adherence, which should be given their ordinary meanings.

37. As a result, the acts of the Respondent in seeking the certificate of registration of citizenship by descent and applying for a New Zealand passport have brought her within the terms of disqualification pursuant to section 29(1)(a) of the 2008 Constitution.

B. The Respondent

38. Mr Rothschild advocates for a strict and narrow construction of section 29(1)(a), and one that is in keeping with section 32(2)(e) both being exceptions to rights expressly stated in the Constitution – the rights to self-determination, freedom of expression and freedom from discrimination – as well as having the effect of narrowing the franchise. They are therefore to be construed strictly and narrowly.

39. He submits that each of the words "allegiance, obedience, adherence" denotes a sincere and deep relationship of obligation or service towards the State and they should be construed *ejusdem generis*.

40. Mr Rothschild further submits, and it does not appear to be contested by the Petitioner, that the mere fact alone of citizenship does not amount to an acknowledgement of

allegiance/obedience/adherence; citizenship is not in itself an "acknowledgement" nor does it necessarily require "allegiance, obedience or adherence".

41. He submits in the circumstances of a provision like section 29(1)(a) of the 2008 Constitution, whose effect is to interfere with enfranchisement and free expression, the word "foreign" is to be construed narrowly so as to minimise such effect. New Zealand is not "foreign" to the extent that: (1) His Majesty King Charles III is Head of State of both the British Overseas Territories and of New Zealand. The oath of allegiance sworn by both Members of the Legislative Assembly of the Falkland Islands and at the grant of New Zealand citizenship is to bear true allegiance to His Majesty King Charles III. For so long as that remains the case, the prospect of conflict between the British Overseas Territories and New Zealand is implausible. (2) New Zealand is a Commonwealth country.

42. His overall submission is the acts of the Respondent were purely administrative processes. The same application form is used for both. There is nothing amounting to a declaration of allegiance, obedience or adherence. No oath or affirmation of allegiance to New Zealand is required (unlike for citizenship of New Zealand by grant). The fact is, submits the Respondent, that any allegiance, obedience or adherence to New Zealand occurred at birth by descent and was not acknowledged by the mere or administrative acts of seeking confirmation of citizenship by descent or applying for a passport.

VII. DISCUSSION AND ANALYSIS

43. The act complained of in this Petition is that the Respondent filled in an application form for "New Zealand Citizenship by Descent and Passport" and posted it to the New Zealand High Commission in London. ("The Acts").

44. The questions for decision are (1) whether The Acts put her under any acknowledgement of allegiance, obedience or adherence to New Zealand; and (2) whether New Zealand is a foreign State within the meaning of section 29(1)(a) of the 2008 Constitution.

45. To determine the questions it is first necessary to establish the true meaning of the words in section 29(1)(a) of the Constitution and secondly, what legal effect The Acts have in New Zealand law. Do they impose under the law of New Zealand allegiance, obedience

or adherence to New Zealand? It is trite law that expert evidence of foreign law is treated as a matter of fact in the courts of the Falkland Islands.

46. It is common ground that the fact of having another nationality by virtue of birth or descent is insufficient to trigger the disqualifying provision. Similarly, it seems acquisition of another nationality of a foreign state by naturalisation whereby an oath of allegiance is taken, or swearing an oath of allegiance when taking a position in the military or other public office of a foreign state would be sufficient to trigger the disqualification.

47. It is important to note that the application form for "New Zealand Citizenship by Descent and Passport" does not require any declaration or oath other than to the truth of the facts set out therein. This is to be contrasted with for example, the United States of America which between 1861 and 1966 required the execution of an Oath of Allegiance to the United States of America as a pre-requisite to the issuance of a passport. See *Woodward v Rogers* (1972) 344 Fed Supp 974 at 981. In that case after 1966 it was accepted that there was no legal authority to deny a passport to a US citizen who refuses to take the Oath of Allegiance.

A. The correct approach to statutory construction in this case

48. It is clear that the task of this court when interpreting statutory provisions is to identify the intention of parliament expressed in the language used. The purpose or mischief the provision was meant to address and the scheme of the legislation provide framework for discerning the appropriate meaning of the statutory text. Other tools to inform the meaning employed will include for example the enacting history; unless the words permit of no other reading, the interpretation will not allow an illogical or absurd result; and in matters where important rights are engaged, only clear words will be sufficient to cut them down.

49. Lord Sales set out the relevant principles in the recent case of *R (PACCAR Inc.) v. Competition Appeal Tribunal* [2023] 1 WLR 2594 where he said at [41]:

> "41. As was pointed out by this court in Rossendale Borough Council v Hurstwood Properties (A) Ltd [2022] AC 690, para 10 (Lord Briggs and Lord Leggatt JJSC), there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. The examples given there are R (Quintavalle) v Secretary of State for Health [2003] 2 AC 687 and Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs [2011] 1 WLR 1546 . In the first, Lord Bingham of Cornhill said (para 8):
> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement

> in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."
> In the second, Lord Mance JSC said (para 10):
> "In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance … In this area as in the area of contractual construction, 'the notion of words having a natural meaning' is not always very helpful (Charter Reinsurance Co Ltd v Fagan [1997] AC 313 , 391 c , per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme." The purpose and scheme of an Act of Parliament provide the basic frame of orientation for the use of the language employed in it."

50. This approach was recently set out by Cockerill J. in *PJSC National Bank Trust* [2023] EWHC 118 (Comm) at [64] where the court said:

> "It is common ground that the Court should have regard to the "ordinary" rules of statutory interpretation, which apply generally. As set out in Bennion on Statutory Interpretation, 8th ed. (2020), paragraph 11-01:
> i) The primary indication of legislative intention is the legislative text, read in context;
> ii) Parliament is assumed to be a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner; and
> iii) The rules, principles, presumptions and canons which govern statutory interpretation are aids to construing the legislative text."

1. ***Determining the legislative purpose of the provision***

51. The purpose of the provision is the starting point. Mr Price KC submits that the uniformly recognized rationale for disqualifying persons from election is the avoidance of an actual or perceived split allegiance or divided loyalty or potential for conflict of interests on the part of members of parliament. As a generalisation, that may be true but the provision, or the type of provision, we are dealing with, while not by any means unique, must be seen in its own constitutional context. This court is only concerned with section 29(1)(a) of the 2008 Constitution and its context within the 2008 Constitution itself. There is a danger of being led into error of construction by reference to similar provisions in other constitutions which have their own constitutional context. There are examples in the materials before me which are illustrative.

52. In Australia, which has a written constitution, for example the similar provision is section 44(i). That reads:

> "..is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power." [Emphasis added]

53. This imposes three different bases for disqualification: (1) a person who is under acknowledgment of allegiance to a foreign state; (2) a prohibition on dual nationality; and (3) a person who is entitled to the rights or privileges of a citizen of a foreign state.

54. This is quite different from the basis for disqualification under the 2008 Constitution which (1) allows dual nationality; (2) allows a person to be entitled to the rights or privileges of a citizen of a foreign state; and (3) only invokes the disqualification for being under acknowledgment of allegiance to a foreign state if that acknowledgment is by virtue of the person's own act. It follows references to texts such as "Foreign Allegiance: A Vexed Ground of Parliamentary Disqualification" by G Carney where the purpose of section 44(i) of the Australian Constitution are opined upon are of limited assistance.

55. In New Zealand, which does not have a written constitution, the Electoral Act 1993 governs the qualification and disqualification of those who can be a member of Parliament. Mr Finlayson KC in his evidence relied on section 55 of that Act. That section reads:

> "55. (1) The seat of any member of Parliament shall become vacant–
> …
> (b) if he or she takes an oath or makes a declaration or acknowledgement of allegiance, obedience, or adherence to a foreign State, foreign Head of State, or foreign Power, whether required on appointment to an office or otherwise; or
> (c) if he or she does or concurs in or adopts any act whereby he or she may become a subject or citizen of any foreign State or Power, or entitled to the rights, privileges, or immunities of a subject or citizen of any foreign State or Power."

56. It follows that while dual nationality *per se* is not an impediment to election to Parliament any act to obtain another nationality is. New Zealand citizenship is essential for membership of Parliament but not essential for registration as an elector under the New Zealand Electoral Act. By virtue of section 74(1), persons who are not New Zealand citizens can vote if they are permanent residents of New Zealand; unlike in the Falkland Islands where citizenship and Falkland Islands status is a pre-requisite to be a voter and member of the Legislative Assembly. The disqualification provision in section 32(2)(e) of the 2008 Constitution is absent from the New Zealand Electoral Act.

57. In the Cayman Islands, the relevant constitutional provision is identical to that in the 2008 Constitution. It reads:

> "62.(1) No person shall be qualified to be elected as a member of the Legislative Assembly who— (a) is, by virtue of his or her own act, under any acknowledgement of allegiance, obedience or adherence to a foreign power or state."

58. However, dual nationality precludes qualification to the Legislative Assembly (now Parliament) of the Cayman Islands unless the person obtained that dual nationality by virtue of birth outside the Cayman Islands. A Cayman citizen, born in the Cayman Islands, who holds another nationality by virtue of descent is disqualified from holding elected office. See section 61(1)(d) in conjunction with section 61(2)(a) and (b) of the Cayman Constitution and *Supervisor of Elections v Dacosta* [2017] (1) CILR 341. This is not the position under the Falkland Islands Constitution.

59. It follows, as these examples show, that while a provision identical or similar to section 29(1)(a) of the 2008 Constitution is and has been historically present in many of the former territories of the British Empire, each must be interpreted in the context of the individual constitution concerned.

60. In my judgment, the purpose set out by Mr Price KC above at paragraph [51] is too broad. The absence of the prohibition on dual nationality (thereby allowing for a potential or apparent divided loyalty), the requirement for a positive act (thereby evidencing an intention), the extension of the disqualification to electors, point to the purpose, or the mischief the provision was to counter, being an <u>actual</u> divided loyalty between the interests of the Falkland Islands and another foreign state or power.

61. The gloss which Mr Price puts in his written argument of the legislative purpose of the words being: "They are meant to ensure that those who take a voluntary step to recognise a foreign citizenship are not qualified for election"; is in my view widening the statutory words too much. Taking a voluntary step to recognising citizenship permits of wider circumstances than steps to 'being under any acknowledgement of allegiance, obedience or adherence to a foreign power or state'.

62. It follows I agree with Mr Rothschild the provisions of sections 29(1)(a) and 32(2)(e) are to be construed narrowly.

2. ***Identical words in the Constitution***

63. It is also clear that, as Lord Hutton said in *R v Kansal* (2) [2002] 2 AC 69 at [102]

> "It is a well established principle that when Parliament uses words in a statute those words should be given a similar meaning in other parts of the statute unless there is some reason to give them a different meaning: see *Courtauld v Leigh* (1869) LR 4 EX 126, 130 per Cleasby B."

64. It follows that the same words in section 32(2)(e) of the 2008 Constitution must be given the same meaning as those in section 29(1)(a) and vice versa. Indeed, section 29(1)(a) of the 2008 Constitution fills any temporal gap that may occur in that to be qualified for election to the Legislative Assembly a person must be registered as an elector pursuant to section 32 of the 2008 Constitution. No person is qualified to be registered as an elector pursuant to section 32 of the 2008 Constitution if section 32(2)(e) is engaged. *Viz* the identical test for disqualification under section 29(1)(a) of the 2008 Constitution. I do not see any reason therefore to give the same words in both subsections a different meaning. It is clear to me that disqualification of a person as an elector is a strong step and such disqualification provision should be construed narrowly. It does not have the wide purpose that Mr Price KC advocates. An elector may well have a conflict of interest but that would not disqualify him from voting. It follows that the same words in section 29(1)(a) also fall to be construed narrowly.

3. ***Important rights***

65. Lord Rodger, quoting with approval the Court of Appeal of Botswana, said in *R v Hughes* [2002] 2 AC 259 (PC) at [35]:

> " 'it is another well known principle of construction that exceptions contained in Constitutions are ordinarily to be given strict and narrow, rather than broad, constructions". In case of doubt paragraph 10 should therefore be given a strict and narrow, rather than a broad, construction.' "

66. The right to vote, and indeed the right to be elected to the Legislative Assembly, are important rights. Exceptions to, and disqualification from, these important rights must be carefully construed.

B. The meaning of the provision " acknowledgement of allegiance, obedience or adherence"

67. The phrase to be construed is: "(a) [who] is, by virtue of his or her own act, under any acknowledgement of allegiance, obedience or adherence to a foreign Power or State.". However, as Smellie CJ said in *Hewitt* [ibid], the meaning of the expression remains unsettled.

68. The words "by virtue of his or her own act" require a positive act. While normally an act includes an omission, in this provision, strictly construed, an omission such as a failure to

relinquish a citizenship obtained by birth, if that engaged the section, would not be enough. While not requiring a subjective intention, it does requires an intentional act that objectively would reasonably engage the specified acknowledgment. An accidental act would not be enough.

69. The word "under". This preposition connotes both a formal and temporal position. The present tense 'is' is used. The draftsman no doubt included the word 'under' so that, if the specified acknowledgment was engaged, it could be remedied – for example, by relinquishing citizenship or formally retracting an oath of allegiance. If this was done, the person may no longer be 'under' the specified acknowledgment.

70. The words "any acknowledgment of allegiance, obedience or adherence". There may be a variety of ways in which an acknowledgment can be made.

71. Taking the Oxford English Dictionary definition of 'acknowledgment' is the usual starting point. While the word acknowledgement can encompass an element of acceptance or at least acquiescence as Deane J. said in his dissenting opinion in *Sykes v Cleary* (1992) 176 CLR, I do not think that is sufficient here.

72. In the Oxford English Dictionary Mr Price KC relied on the first usage but Mr Rothschild the fourth usage. In the light of the seriousness of the disqualification and the required narrow construction the forth usage labelled 'Law' seems most appropriate, it says:

> "4. Law. Avowal of an act or document so as to give it legal validity; formal declaration, recognition, or assent; an instance of this."

73. An early use of the word in context is to be found in the British North America Act (or Act of Union) 1840 which reunited the Provinces of Upper and Lower Canada, section 7 of which provided that the place of a Legislative Councillor was to become vacant if the Councillor inter alia:

> " … shall take any Oath or make any Declaration or Acknowledgement of Allegiance, Obedience, or Adherence to any Foreign Prince or Power, or shall do, concur in, or adopt any Act whereby he may become a Subject or Citizen of any Foreign State or Power, or whereby he may become entitled to the Rights, Privileges, or Immunities of a Subject or Citizen of any Foreign State or Power …" [Emphasis added]

74. Indeed, Mr Rothschild has also pointed to the fact that an even earlier similar wording is contained in section 7 of the Clergy Endowments (Canada) Act (or Constitutional Act) 1791 (31 Geo. 3, c. 31), which divided the provinces of Upper and Lower Canada, and disqualified persons who swore:

from taking up a hereditary right to be summoned to the Legislative Council.

75. In the British North America Act 'Acknowledgment' sits alongside taking an Oath or making a Declaration. Construing this *ejusdem generis* it appears to me that 'acknowledgment' is to be used in the legal sense as set out in the fourth usage in the Oxford English Dictionary and requires an element of formality. It will of course encompass the making of any oath or declaration.

76. On the meaning of the word 'allegiance' both parties drew my attention to the case of *Calvin* (1608) 77 ER 377, pp.382-383, albeit different passages:

> "a true and faithful obedience of the subject due to his Sovereign. This ligeance and obedience is an incident inseparable to every subject: for as soon as he is born he oweth by birth-right ligeance and obedience to his Sovereign … As the ligatures or strings do knit together the joints of all parts of the body, so doth ligeance join together the Sovereign and all his subjects … ligeance is the mutual bond and obligation between the King and his subjects, whereby subjects are called his liege subjects, because they are bound to obey and serve him; and he is called their liege lord, because he should maintain and defend them.
> …
> "This word ligeance is well expressed by divers several names or synonyma which we find in our books. Sometimes it is called the obedience or obeisance of the subject to the King […] Sometimes ligeance is called faith […] By all which it evidently appeareth, that they that are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural subjects, and no aliens."

77. Mr Rothschild delved into *Blackstone's Commentaries* (1775):

> "Natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth. For, immediately upon their birth, they are under the King's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature …
> Local allegiance is such as is due from an alien, or stranger born, for so long a time as he continues within the king's dominion and protection: and it ceases, the instant such stranger transfers himself from this kingdom to another. … …
> allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent."

78. He continued with "What is allegiance", *East's Pleas of the Crown* (1803):

> "Allegiance is that obedience and fidelity which every person, under the protection of the laws and government, owes, in return for that protection, to the person of the king, as the supreme head of the state, and dispenser of those laws and that government. It is the tie which binds every subject to be true and faithful to his sovereign liege lord the king, and

> truth and faith to bear of life and limb and earthly honour; and not to know or hear of any ill intended him without defending him therefrom. This duty of allegiance also binds all persons to serve the king faithfully and diligently in their several stations; to assist him with their advice when called upon; and to serve him in their persons, if able, in defence of the realm against rebels and foreign invaders: and they are indictable as for a high misdemeanor for the wilful neglect or refusal of any of these their bounden duties. The same duty binds every subject beyond sea to return upon the king's letters for that purpose, or to refrain from going abroad, upon the king's pleasure so expressed either by the writ of ne exeat regnum, or under the great or privy seal or signet, or by proclamation; for the contempt of which he is indictable at common law, and his lands may be seized til his return. And inasmuch as the duties and obligations of the king towards his subjects arise from the moment that he is invested with the regal character, and antecedent to his coronation oath, which is only a more solemn recognition of those inherent obligations; so there is an original, implied, and virtual allegiance which the subject owes to the sovereign antecedent to any express oath or engagement to that effect; for the breach of which, at an age of discretion, he is amenable to justice." [Emphasis added]

79. From these old works it is easy to see that allegiance in those times was seen as a strong bond between subject and sovereign. In 2008 when the Constitution was passed, with dual nationality possible, and the much more formalised position on citizenship and nationality, it is difficult to see allegiance in those strict terms, but nevertheless it connotes the imposition of a strong loyalty to the foreign power, not a weak connection.

80. On the meaning of allegiance, Mr Price KC and some of the authorities he referred to rely on the case of *Joyce v DPP* [1946] AC 347. This is the case of "Lord Haw Haw" who was tried for treason after World War II. He was not a British subject but had resided for some time before the war in England. The allegiance which he was regarded by the court as owing to the British Crown flowed from his having obtained a British passport by misrepresenting his real nationality, having travelled to mainland Europe on the passport and having remained, even while abroad in Germany, under the protection of the Crown which the passport ostensibly provided him during its currency.

81. On reading this case I failed to see the relevance to the interpretation we are dealing with of section 29(1)(a) of the 2008 Constitution. It clearly does not deal with the expression "under any acknowledgement of allegiance, obedience or adherence" at all. The case turned upon the question of whether there was jurisdiction to try an alien subject, Joyce, for treason committed by him while he was abroad in Germany.

82. It is true that the court made comments about the allegiance owing from an alien possessing a passport, but the true meaning of a passport was considered. Lord Jowitt at 369-370:

> "The material facts are these, that being for long resident here and owing allegiance he [Joyce] applied for and obtained a passport and, leaving the realm, adhered to the King's

> enemies. It does not matter that he made false representations as to his status, asserting that he was a British subject by birth, a statement that he was afterwards at pains to disprove. It may be that when he first made the statement. He thought it was true. Of this there is no evidence. The essential fact is that he got the passport and I now examine its effect. The actual passport issued to the appellant has not been produced but its contents have been duly proved. The terms of a passport are familiar. It is thus described by Lord Alverstone CJ in R v Brailsford. 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. It is immaterial that he has obtained it by misrepresentation and that he is not in law a British subject. 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. The question is not whether he obtained British citizenship by obtaining the passport, but whether by its receipt he extended his duty of allegiance beyond the moment when he left the shores of this country. As one owing allegiance to the King he sought and obtained the protection of the King for himself while abroad." [Emphasis added]

83. In my view, the relevance of the case of *Joyce* is that it establishes that a passport is a voucher and means of identification. It does not help with being under an acknowledgment of allegiance, obedience or adherence to a foreign power. I am fortified in this approach by the judgment of Smellie C.J. who comes to exactly the same view in *Hewitt* [ibid].

84. As can be seen above there have been identified three types of allegiance. Natural, local and acquired. In the present context natural allegiance will be by virtue of birth; local allegiance will be by residence, and acquired allegiance may be by naturalisation or grant of citizenship or express oath or declaration of allegiance. The Respondent's allegiance was acquired by descent being born to a New Zealand citizen.

85. The way in which allegiance is acquired is important. Local allegiance and acquired allegiance will normally arise by virtue of a voluntary act. Living in a country, taking an oath of naturalisation for example. Allegiance by birth does not require any voluntary act.

86. The word "adherence" is set out in modern dictionaries as someone behaving exactly according to rules, or the obeying of a rule or law. Adherence under the Treason Act 1351

means giving aid or comfort to the King's enemies. Under the 1351 Act it is treason for a person to *inter alia* ".. be adherent to the King's enemies".

87. In *R v Casement* [1917] 1 KB 98, the defendant was charged with that species of treason which is known as adhering to the King's enemies. The Lord Chief Justice directed the jury that the meaning of adherence was:

> "If a British subject does an act which strengthens or tends to strengthen the enemies of the King in the conduct of a war against the King,"

88. In the present case, the closest meaning of the word will be for a person to acknowledge he will give aid or comfort to a foreign power.

89. The word "obedience" is defined in the Oxford English Dictionary as:

> "The action or practice of obeying or doing what one is bidden;… submission to the rule or authority of another; compliance with or performance of a command."

90. The meaning here which fits most appropriately given a narrow construction is that of submission to the rule or authority of another. The other being the foreign power set out in the subsection.

91. The words 'allegiance, obedience or adherence' are all of a genus. Bringing all those strands together, the provision requires that there must be a positive acceptance of a strong bond between the person and the foreign state and one where the person accepts obligations of service to the foreign state.

C. The meaning of "foreign state"

92. What is a foreign state is not defined in the 2008 Constitution. Had it not been for the legislative history of the provision, I would have had no difficulty in accepting New Zealand is a foreign state within the meaning of section 29(1)(a) of the 2008 Constitution.

93. In *R v Foreign Secretary, Ex parte Indian Association* [1982] QB 892, the Court of Appeal considered whether treaty obligations entered into by the Crown owed to certain Indian people of Canada were the responsibility of Her Majesty in right of her Government in the United Kingdom, rather than in right of her Government in Canada. In that case, Kerr LJ said, at p.920H-921B, that:

> "It is settled law that, although Her Majesty is the personal sovereign of the peoples inhabiting many of the territories within the Commonwealth, all rights and obligations of the Crown - other than those concerning the Queen in her personal capacity - can only arise in relation to a particular government within those territories. The reason is that such rights

> and obligations can only be exercised and enforced, if at all, through some governmental emanation or representation of the Crown."

94. This decision was applied in *Sue v Hill* [1999] HCA 30, where the Australian High Court said at §59:

> "It may be accepted that the United Kingdom may not answer the description of "a foreign power" in s44(i) of the Constitution if Australian courts are, as a matter of the fundamental law of this country, immediately bound to recognise and give effect to the exercise of legislative, executive and judicial power by the institutions of government of the United Kingdom. However, whatever once may have been the situation with respect to the Commonwealth and to the States, since at least the commencement of the Australia Act 1986 (Cth) ("the Australia Act") this has not been the case."

95. Mr Price KC also drew my attention to *AG of St Christopher and Nevis v Douglas* [2020] 5 LRC 1, at paragraph 32, where it was found that Dominica was a foreign state for the purposes of the relevant constitution notwithstanding the fact that Dominica is a member of the Organisation of Eastern Caribbean States, the Caribbean Community and the Commonwealth of Nations, as they were vested with independent international legal personalities, with separate and distinct laws relating to citizenship and its citizens owed different allegiances. (The result in that case is distinguishable on its facts as it involved the acquisition and use of a diplomatic passport with its additional rights and privileges).

96. There is no doubt that New Zealand has separate legislative, judicial and executive institutions from the Falkland Islands. The point made by Mr Rothschild that the Respondent has taken an oath to King Charles III who is also the sovereign of New Zealand, does not take the matter much further as I accept although King Charles III is head of state in both the Falkland Islands and New Zealand, he is Sovereign *in right of the Falkland Islands* and Sovereign *in right of New Zealand.* It follows *prima facie* New Zealand is a foreign state to the Falkland Islands.

97. However, while Mr Rothschild seemed to accept the generality of the position of New Zealand being a foreign state, he submitted that the meaning of 'foreign state' within section 29(1(a) of the 2008 Constitution has a specific meaning owing to the enacting history of that provision.

98. Under the Falkland Islands Constitution Order 1985 ("the 1985 Constitution") the material provisions were:

> "23. Qualifications for election.
> Subject to the provisions of section 24 of this Constitution, <u>any person who is a Commonwealth</u> citizen of the age of twenty-one or upwards, is registered as a voter in the

constituency in which he is seeking election and is not prohibited by any law from so voting shall be qualified to be elected as a member of the Legislative Council.

24. Disqualifications for election.
(1) No person shall be qualified to be elected as a member of the Legislative Council who-
(a) is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a foreign Power or State;
…
25. Vacation of seats.
The seat of an elected member of the Legislative Council shall become vacant -
…
(c) if he ceases to be a Commonwealth citizen or, by virtue of his own act, becomes under any acknowledgement of allegiance, obedience or adherence to a foreign Power or State;

27. Qualifications of electors.
(1) Subject to the provisions of subsection (2) of this section, a person shall be qualified to be
registered as an elector for the purpose of the election of members of the Legislative Council if,
and shall not be qualified unless, on the qualifying date for registration as such an elector-
(a) he is a Commonwealth citizen;
(b) he is eighteen years of age or over; and
(c) he has been resident in the Falkland Islands during the qualifying period: [Emphasis added]

99. It is clear the qualification to be an elector and to be elected to the Legislative Assembly was being a Commonwealth citizen. It is not disputed that New Zealand was and is a Commonwealth country. It follows it cannot have been the intention of the draftsman to include Commonwealth countries with the definition of a foreign Power or State within section 24(1)(a) of the 1985 Constitution.

100. This position is accepted as correct by the Petitioner. Mr Price KC for the Attorney General accepted that under the 1985 Constitution the Respondent would not be at danger of disqualification by her acts of applying for registration of New Zealand Citizenship or applying for a New Zealand passport. This is because under section 24(1)(a) of the 1985 Constitution New Zealand was not a foreign Power or State.

101. The question therefore that arises is what constitutes a foreign Power or State under the equivalent section 29(1)(a) of the 2008 Constitution.

102. Section 24(1)(a) of the 1985 Constitution and section 29(1)(a) of the 2008 Constitution are identical. There is no definition of what is a foreign Power or State in the 2008 Constitution.

103. Mr Price KC was driven to argue that the meaning of foreign Power or State in section 29(1)(a) has evolved in the 2008 Constitution to include Commonwealth counties because those qualified for election and qualified to vote have been reduced from Commonwealth citizens to citizens (defined by section 32(5)(a) as British Citizens, British overseas territories Citizens or British Overseas Citizens) who have Falkland Island Status.

104. However, as Mr Rothschild points out, section 32(1)(b) of the 2008 Constitution contains grandfather rights (rights obtained, in this case under previous legislation, that are carried forward into more recent legislation). Mr Price KC accepted that a narrow group of Commonwealth citizens from the 1990s could avail themselves of these rights. He attempted to say there could not be very many. That is an irrelevant consideration as this is a matter of law and construction.

105. I am of the opinion the grandfather rights are important. It shows the draftsman of the 2008 Constitution preserved the status of existing Commonwealth citizens. To hold as Mr Price KC urges that the meaning of foreign Power or State must have evolved would mean that an existing Commonwealth citizen who is a member of the Legislative Assembly who applies for a Commonwealth passport, would on Mr Price KC's case, fall foul of section 29(1)(a) of the 2008 Constitution. That is an absurd result.

106. In 1985 certainly there were important English statutes that still distinguished between foreign states and Commonwealth states. The Extradition Act 1870 for example, when it referred to a foreign state excluded Commonwealth states who were separately dealt with under the Fugitive Offenders Act 1967.

107. Mr Rothschild showed me the Falkland Islands Defence Force Ordinance 1991 which is currently in force. Section 7 of that Ordinance prohibits aliens from service and only allows British subjects to join the Defence Force. British subject includes a Commonwealth citizen. That Ordinance was not and has not been amended to reflect a restriction on Commonwealth citizens.

108. The draftsman of the 2008 Constitution could have clarified or defined what the precise meaning of foreign Power or State encompassed. He did not. Indeed, Mr Price KC showed me a provision from the National Security Act 2023 whereby section 32 set out the meaning of 'foreign power'. This demonstrates that the legislature can and does define such words and this is exactly the type of thing that the draftsman of the 2008 Constitution

could have done if the meaning of foreign Power or State was to have changed from the 1985 Constitution to the 2008 Constitution in an identically worded section.

109. It is often said that parliament does not legislate by a side wind. To interpret the words in section 29(1)(a) of the 2008 Constitution differently by some form of evolution as Mr Price KC invites me to do is in my judgment a step too far. As it is said in *Bennion* at 693:

> "It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provisions."

110. In provisions that must be strictly construed, and which affect constitutional rights, it is up to the legislature to make those changes and it should not simply be done by judicial interpretation. If there is ambiguity as to whether foreign power or state includes or excludes Commonwealth states, then the narrow construction would prevail. It follows that those states that were existing Commonwealth states as at the commencement of the 2008 Constitution are not foreign Powers or States for the purposes of section 29(1)(a) of the 2008 Constitution.

VIII. APPLICATION OF THE FACTS TO THE STATUTORY PROVISION

111. It follows foreign Power or State in section 29(1)(a) of the 2008 Constitution does not include Commonwealth states, including New Zealand, and therefore the Acts of the Respondent do not engage section 29(1)(a) of the 2008 Constitution. That is enough to dispose of the Petition in the Respondent's favour, but as all matters have been fully argued I will continue to set out my analysis and conclusions.

112. The Acts as defined in paragraph [43] above can be said to amount to an acknowledgment by the Respondent of her New Zealand citizenship by descent and her entitlement to a New Zealand passport.

113. Does the confirmation of an existing citizenship and application for a passport obtainable as of right amount under New Zealand law to an acknowledgement that you have allegiance, obedience or and adherence to New Zealand?

A. The expert evidence

114. Both experts were well qualified. There were only small differences between them as identified in the report set out at paragraphs [28] and [29] above. Mr Rothschild indicated he had little in material dispute with the position of Mr Finlayson KC.

115. In so far as there is a difference in their evidence I prefer the evidence of Mr Keith. Mr Finlayson relied on *Joyce* and the way in which it had been used in *Dabdoub v Vaz* (2009) 75 WIR 357. As I have indicated above I think the reliance put on *Joyce* in *Dabdoub* is misplaced as did Smellie CJ in *Hewitt*. When I asked Mr Finlayson if he had considered *Hewitt* he said he had but there was no mention of it in his report and he had done no analysis of the critique by Smellie CJ in *Hewitt.* He gave no explanation of why Smellie CJ's critique was in error. Further, Mr Finlayson KC in his report identified the case of *Harry Duynhoven* having similarities to the case at the bar. On a close reading it is difficult to discern those similarities other than superficially. In the *Duynhoven* matter section 55(1)(c) of the New Zealand Electoral Act 1993 was engaged. That provision concerns becoming a subject or citizen of a foreign state or power. It was not concerned with section 55(1)(b) which is a similar provision to our section 29(1)(a) of the 2008 Constitution. Further, Mr Keith gave his evidence in a careful and analytical way and provided support for his propositions.

116. An issue between the experts was the duties owed by a citizen of New Zealand to the state. Mr Finlayson KC was of the opinion there were concomitant obligations but could not point to any statutory provisions to support this. Mr Keith said there were no concomitant obligations on the citizen as there was not statutory provision that imposed duties and obligations on a New Zealand citizen by birth or descent, and not resident in New Zealand. There was no reciprocity in a legal sense as there was no statutory requirement for a New Zealand citizen to serve or obey the Sovereign. In his view the statutory scheme was dispositive of the issue of reciprocity.

117. Mr Keith was firmly of the opinion that the registration of citizenship by descent and possession of a passport was merely evidential and declaratory. In line with *Joyce* above, which supports his position, I accept it.

118. There was no dispute between the experts that both citizenship by descent and the obtaining of a passport by a New Zealand citizen by descent were as of right. They cannot be withheld. This to me means, and I agree with Mr Keith, that no reciprocity is required for these rights.

119. Mr Keith was firm in saying that there was no general obligation not to act contrary to New Zealand interests, and the right to registration of citizenship by descent and a passport cannot be withheld.

120. His evidence came to this:

> "in applying for or renewing a New Zealand Passport a citizen is not required to prove or acknowledge allegiance to New Zealand. One could in fact harbour a sense of animosity towards New Zealand or its government of the day but would nonetheless be entitled to be a citizen of New Zealand by descent and to a passport as an entitlement of citizenship as well"

121. The evidence of Mr Keith was that being a New Zealand citizen does grant rights but no duties other than potential exposure to a few extra-territorial crimes applicable to citizens, but which are also applicable to anyone resident in New Zealand regardless of citizenship.

122. It follows as a matter of New Zealand law, a matter of fact before me, that the actions taken by the Respondent were more administrative and evidential. Citizenship by descent in New Zealand law does not require allegiance, obedience or adherence in the meaning required by section 29(1)(a) of the 2008 Constitution.

B. Citizenship

123. In short, the case of the Petitioner is that acknowledgment of a foreign citizenship is enough because that citizenship brings with it allegiance to the foreign state.

124. I agree with Mr Rothschild that the mere fact of citizenship does not amount to an acknowledgement of allegiance, obedience or adherence. There may be some cases where foreign law dictates that citizenship alone can have this effect. But the law of New Zealand is not one of them.

125. It is clear to me that entitlement or access to the rights or privileges of a citizen is different from an acknowledgement of allegiance, obedience or adherence; "allegiance", "obedience" and "adherence" are concepts concerned with obligation owed or service performed by the individual rather than the individual's receipt of benefits.

126. As Mr Rothschild points out these conclusions are emphasised by section 44 of the Australian Constitution, which addresses the concepts disjunctively, as follows: "Any person who: (i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject

or a citizen of a foreign power; … shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives." [Emphasis added]

127. The disjunctive nature of the different limbs of section 44 emphasises the difference between the clause dealing with what rights or privileges a citizen is entitled to; and the clause dealing with what acknowledgement a citizen must put themselves under.

IX. CONCLUSIONS

128. The taking of an oath of allegiance, serving in the armed forces, engaging in espionage for a foreign state, are all acts which are clearly capable of engaging section 29(1)(a) of the 2008 Constitution. On the other hand, the application for recognition of citizenship by descent and a passport, rights to both of which arise at birth, are acts which do not meet the high threshold required by section 29(1)(a) of the 2008 Constitution. Nor, do I think use of a passport obtained in such a manner would do so. I refer to Smellie CJ in *Hewitt* at [174] and [185] where he said construing the identical provision in the Cayman Constitution as to section 29(1)(a) of the 2008 Constitution:

> "But no one could sensibly suggest that any such concerns arise from the mere holding of a foreign passport acquired openly and publicly as an ordinary incident or privilege of a foreign citizenship.
> …
> I am also satisfied that the first Respondent, in renewing and using her US Passport as an ordinary incident of her US citizenship, acquired at birth - and a citizenship she is allowed to keep by virtue of section 62(2)(b) of the Constitution – has not placed herself under any acknowledgment of allegiance, obedience or adherence to a foreign state or power .."

129. I agree. The Respondent acquired her New Zealand citizenship at birth. A citizenship the 2008 Constitution allows her to keep. More so, in respect of a state such as New Zealand that does not impose legal obligations (and I do not include merely the extension of criminal jurisdiction over a citizen as one of those legal obligations) on its citizens.

130. In any event as I have held New Zealand is not a foreign Power or State within the meaning of section 29(1)(a) of the 2008 Constitution.

131. Accordingly, the Petition is dismissed. I understand that the Respondent has also been removed on the same grounds from the register of electors. While that matter is not before me, given my ruling that section 29(1)(a) and section 32(2)(e) of the 2008 Constitution are synonymous it should follow that appropriate action be taken so that she is restored to the register.

132. I should finally note my appreciation to all counsel in this case who have, in the high traditions of the bar, through their evident hard work, brought all the relevant materials to my attention and assisted the court in coming to its determination.