IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT AUCKLAND

CA.5/99

IN THE MATTER	of an election of Members of Parliament of the Cook Islands (Constituency of Pukapuka/Nassau) held on the 16th day of June 1999
AND	
IN THE MATTER	of the Electoral Act 1998, section 96(4)
BETWEEN	TIAKI WUATAI
	Applicant/Appellant
AND	INATIO AKARURU
	First Respondent
AND	THE CHIEF ELECTORAL OFFICER of Rarotonga
	Second Respondent

Hearing: 11 August 1999

Coram: The Hon Sir Graham Speight JA (Presiding)
The Hon Sir Ian Barker JA
His Honour Justice AG McHugh, JA

Counsel: Dr Rodney Harrison & MC Mitchell for Applicant/Appellant:
GB Chapman and Mrs TB Browne for First Respondent
AM Manarangi for Second Respondent

Oral Judgment: 11 August 1999

Date of Delivery of Reasons for Judgment: 17 August 1999

REASONS FOR JUDGMENT OF THE COURT DELIVERED BY THE HON SIR GRAHAM SPEIGHT JA

Solicitors:
Stevenson Nelson & Mitchell, Rarotonga, for Applicant/Appellant;
Clarkes, P.C. Solicitors, Rarotonga, for First Respondent;
AM Manarangi, Solicitor, PO Box 514, Rarotonga, for Second Respondent.

On 11th August 1999, the Court, in a brief oral ruling, gave judgment reversing the decision of the Court below and declaring the election for the constituency of Pukapuka/Nassau to have been void. The consequence of that order will be that a by-election be held. The Court's reasons for that decision follow.

On an election petition pursuant to s 96 of the Electoral Act 1998 ("the Act") Hillyer J, in the High Court, allowed the petition of the present respondent, disqualified the previously elected candidate – the appellant – and, pursuant to s 102 of the Act, declared the respondent to be elected by default as the only qualified candidate at the polling date.

The appellant applied to Hillyer J for leave to appeal under s 102 of the Act. On the 3rd August 1999 that application was declined. The appellant applied to this Court under Article 60(3) of the Constitution for special leave to appeal and that application is granted but only on a question of law. The appeal now before us requires consideration of s 105 of the Act, the hearing before Hillyer J of the present respondent's original election petition, and the learned Judge's decision dated the 13th July 1999, in which the petition was allowed, the present appellant was disqualified and the respondent was declared to have been duly elected. In his oral decision the Judge considered that as at the date of the appellant's nomination (the 29th April 1999), he was a Crown servant and, therefore, by virtue of Article 28B(1)(e) of the Constitution and also s 6 of the Act on that date ineligible to have stood as a candidate.

Some debate had taken place before Hillyer J concerning the effective date of the appellant's retirement as a teacher at the Pukapuka School. It might have been interesting to interpret, as a matter of law, the meaning and the

timing of his letter of the 27th April 1999 wherein he purported to resign. There was no stated date within the letter for the intended cessation of service. But there was apparently evidence from the appellant and from the principal of the school which showed that the appellant had still served as a teacher up to and including the 30th April 1999, one day after his consent to nomination. Although Hillyer J expressed some reservation about certain aspects of the evidence of these two people, he accepted that the appellant's employment as a Crown servant was up to and including the 30th April.

That finding clearly was one of fact and that description is crucial to matters which will follow hereafter because the right to appeal is circumscribed by s 105 of the Act. Under subsection (1), decisions of the High Court on electoral petitions are declared to be final and conclusive and without appeal. Dr Harrison, counsel for the appellant, very properly conceded that the finding of fact that the appellant's resignation was made on the 27th April 1999, prior to his nomination, but also prior to his last day of service as a teacher on the 30th April, was a finding of fact which cannot be challenged on an appeal. That, however, is not the end of the jurisdiction under s 105 for this appeal is against the whole of the determination by Hillyer J which was:

(a) that the finding as to resignation was one of fact, and therefore unappealable; and

(b) that as a consequence, the respondent, Mr Akaruru, was declared to be elected by virtue of there being no other valid nominee.

The wording of s 105(2) allows an appeal:

> "to any party who is dissatisfied with any decision (emphasis added) of the Court as being erroneous in any point of law and in its determination, this Court may confirm, modify or reverse the decision appealed against ... or any part of that decision" (emphasis added).

It is therefore required that we should consider whether the judgment of the Court was an error in law in declaring the respondent to be elected. It is to be noted that the Judge, in so doing, immediately after his declaration on the question of fact issue, proceeded to declare the respondent elected but no reasons were given. Modern practice has developed to the stage where it is recognised that part of a Judge's duty, especially in complicated issues, is to give reasons for reaching a final determination: indeed failure to do so or at least state what matters have been taken into consideration may be regarded as a failure amounting to an error of law.

As will be developed later, that is not the only basis for considering that a question of law arose on the second issue. Before doing so, however, it is mentioned there was some discussion on the first issue on the hypothesis that the resignation question could be challenged as a point of law which, in our view, it clearly cannot. Questions as to the mandatory or directory nature of the supposed prohibition, particularly in s 6, were canvassed. in our view, the irregularity matters were not open to debate within the factual finding submissions and indeed for this reason we were able to relieve Mr Chapman of making detailed submissions in reply to the earlier matters advanced by Dr Harrison in this regard. However, as we shall elaborate, the question of irregularity has relevance to the second part of the hearing relating to the Judge's order where we consider points of law do arise. In doing so, however, we emphasise that no concern arises on our part requiring consideration of the consequences of the letter of resignation from the mandatory/directory argument advanced by Dr Harrison. We rule that

this was not tenable and did not require it to be canvassed further by the respondent.

We revert to the second part of the Judge's ruling wherein it was held that because the appellant was ineligible, the respondent was elected as if the only candidate. In particular, we note that Dr Harrison, in his submissions, mentioned that after the transactions of the 27th to 30th April, the appellant had had misgivings as to his qualifications to be nominated. It was said that he had consulted the authorities and had been assured that, contrary to earlier advice from officialdom, the Chief Electoral Officer, after consulting Crown Law Office, ruled that the nomination was in order. Thereafter the poll was conducted with the appellant and the respondent as candidates with the subsequent declaration of the appellant to be elected. We have checked the record and find assistance in support of Dr Harrison's comment in the draft Case Stated which was prepared on behalf of the appellant for the application for leave to appeal. Although this was not signed by the Judge – for he refused leave – there is a statement, which we accept as being valid, at p 6 of the record, that the Chief Electoral Officer had given evidence that he had advised the appellant that he was not properly nominated but following consultation with Crown Law Office he reversed that decision. In confirmation of this, he wrote to the appellant's political party on 31st May advising of the appellant's eligibility as a candidate.

This written advice was after nominations had closed, for the latest time for lodging nominations was noon on the 20th May 1999. It was at about this time apparently that the appellant had been told that he was disqualified. There is a confirmatory letter from the electoral office to that effect dated the 25th May 1999. Accordingly it would have been too late for his party to have nominated another candidate in lieu. But it is clear that the question of

his status vis-a-vis his position as a Crown servant was known to various people during the month of May. At what stage it is not certain. However, by the afternoon of the 20th May, it was too late for any other candidate to be substituted and indeed, because of the assurance received on the 31st May, the appellant would have believed himself qualified.

The electoral office, having so determined, printed the rolls and did all other matters leading up to the election and conducted the same with two apparent qualified candidates. Had the correct conclusions been reached by the Chief Electoral Officer at an earlier date, when the appellant's status as a school teacher had been well-known, his party advisers would doubtless have considered the position and regard may well have been paid even after the 31st May, to the provisions in s 44 concerning death or retirement of a candidate.

It seems likely that an attempt would have been made to take advantage of those provisions, for upon a retirement notice being accepted by the returning officer, the election in that constituency is to have been cancelled and a subsequent by-election called with the opportunity of a fresh nomination from the appellant or from some other member of his party. It is true that in s 44, no comparison is made between the advice by a candidate of retirement as against the closing date for accepting nominations. However, by a parity of reasoning against the situation relating to death, it would appear that the disappearance from either cause, death or retirement, can occur at any time prior to polling for it would be an obvious recognition of the purposes of the Act that electors wishing to do so should exercise a choice between properly-nominated candidates. The death of one of these persons at any time prior to the election would bring into play the provision

for cancellation and subsequent by-election. If so in respect of death, we see no reason why the same provision would not apply in retirement cases.

We conclude therefore that had the correct conclusion been reached by the Chief Electoral Officer, as has been reached by the hearing Judge, the appellant and his party advisers would doubtless have considered the position and the prospect of cancellation; and a subsequent by-election would be in accord with democratic principles offering a right to constituents to choose.

There can be no doubt but that the appellant in this matter was acting in good faith because of his attempt to resign prior to nomination: but in effect had not done so. But misunderstanding of his status by the electoral office during May and June led him to being erroneously included in as a candidate but with subsequent disqualification, and responsibility for this unfortunate sequence must, in part, rest with the erroneous decision given by the electoral office officials and their advisers.

Insofar, therefore, as this appeal is against the declaration by the learned Judge of the sole candidature and declaration of the respondent as elected, the events leading up to the election and the mismanagement thereof were, in our view, substantial irregularities in "the proceedings preliminary to the polling" as a result of which the election was not conducted in accordance with the principles laid down in the Act (s 101). To this one must add matters already referred to namely, the omission by the Judge to give reasons for declaring the respondent to have been elected. We accept that to so declare, particularly without discussion of what matters had been taken into account in reaching that decision, was to disenfranchise half the electorate due in part, it is true, to the appellant's own transgression of s 6

and Article 28B(1)(e) but also to irregularities for which some blame must attach to officialdom.

In assessing the desirable course to be followed, we gain considerable assistance from two earlier cases, admittedly under English Electoral Acts, namely ***Gunn v. Sharpe*** (1974) 1 QB 808 and ***Morgan v. Simpson*** (1975) 1 QB 151, as to the desirability of giving effect to the purpose of the Act in procuring open and balanced elections and avoiding the disenfranchising of substantial numbers of the electors in cases where there has been some official mismanagement or human error. Both these cases were of considerable assistance to Donne CJ in the ***Mitiaro Election Petition*** [1979] 1 NZLR 51.

For these reasons we have concluded that in the second part of the decision given at the hearing of this petition, there was an error of law which has resulted in such an avoidance of the carrying out of the purpose and pattern of the Act that the appropriate course is to reverse that part of the decision and void the election in this constituency.

As a consequence there will need to be a by-election and the Registrar of the Court is instructed to convey the effect of this decision to the Chief Electoral Officer who will be obliged to take the appropriate steps pursuant to ss 102 and 8(1)(b).

The requirement that an appeal is to be by way of Case Stated can only apply where the Judge gives leave to appeal. Where the Judge, as here, did not give leave to appeal, any other construction which would make the filing of a Case Stated a condition precedent to an appeal would not be sensible.

In all the circumstances we make no order as to costs.

J.A.