IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA (CIVIL DIVISION)

C.A. 3/2001

IN THE MATTER	of a By-Election for the Constituency of Pukapuka/ Nassau held on Thursday 28 day of September 2000
AND	
IN THE MATTER	of the Electoral Act 1998, Section 96 (4)
BETWEEN	**INATIO AKARURU OF PUKAPUKA/NASSAU**
	Appellant
AND	**TIAKI WUATAI OF PUKAPUKA/NASSAU**
	First Respondent
AND	**CHIEF ELECTORAL OFFICER OF RAROTONGA**
	Second Respondent

Ms Mai Chen and Mrs Tina Browne for Appellant
Mr R E Harrison QC and Mr M C Mitchell for First Respondent
Mr A Manarangi for Second Respondent
Dates of hearing: 5, 6 November 2001
Date of Judgment: 14 November 2001

JUDGMENT OF GREIG CJ, HENRY J, HINGSTON J

This appeal is from a judgment of Williams J delivered on 23 March 2001 dismissing an election petition in respect of a by-election held on 28 September 2000 for the constituency comprising the islands of Pukapuka and Nassau. The appeal is confined to the issue of eligibility of two electors,

each of whom had resided in Pukapuka for less than three months immediately prior to their respective applications for enrolment in the constituency. It is a continuation of a long saga. Following the general election held on 16 January 1999 and a subsequent decision of this Court on an election petition a by-election was ordered. This was held on 29 September 1999, but because a number of votes had been improperly included the result was declared invalid and a further by-election ordered. This led to the introduction of the Electoral Amendment (No. 2) Act 1999, which came into effect on 22 December 1999. The interpretation of that amending Act is at the heart of this appeal.

The train of events concerning the election for this constituency and other judicial decisions demonstrated that the 1998 Electoral Act was in several respects unclear. It was therefore thought desirable to introduce the 1999 amendment to bring some certainty to the process governing the second by-election. Unfortunately the intended clarity did not emerge. The Act was directed solely to the by-election, the long title declaring that it was making special provision for that. It provided a timetable for certain steps (which itself caused problems which required a decision of the High Court), it suspended the existing roll which was declared of no effect for the purposes of the by-election, and required any intending elector to enrol "afresh". The Act also in s. 5 expressed the qualifications necessary to apply for registration, enrolment, and eligibility to cast a vote. Throughout, the Act makes it plain that where necessary it overrides the provisions of the principal 1998 Act.

In the High Court Williams J held that what he termed the clear and express provisions of s. 5 of the 1999 Act governed the qualifications to vote, and that there was no constituency residential requirement. Section 5 states:

"Qualifications to Apply for Registration as an Elector – (1) Notwithstanding anything to the contrary in the principal Act, the qualifications of any person to –

(a) apply for registration and be enrolled pursuant to section 4 of this Act; and

(b) cast a vote as an elector in the By-election,

shall be the possession by the applicant or elector (as the case may be) of the qualifications stated in section 13 of the principal Act as at the date of his or her application for registration pursuant to section 4(1) of this Act."

Section 13 of the principal 1998 Act provides:

"Qualifications for Registration of Electors – A person is qualified to be registered as an elector for a constituency in the Cook Islands if that person –

(a) is 18 years of age or over;

(b) is a Commonwealth citizen, or has the status of a permanent resident of the Cook Islands;

(c) has at some period actually resided continuously in the Cook Islands for not less than 12 months;

(d) has been resident in the Cook Islands throughout the period of 3 months immediately preceding that person's application for enrolment as an elector and has not subsequently qualified as an elector under subclause (2) of Article 28 of the Constitution.

(e) has not been convicted of any corrupt practice or any offence punishable by death or imprisonment for a term of 1 year or more

unless in each case that person has received a free pardon or has undergone the sentence or punishment to which that person was adjudged.

(f) is not of unsound mind."

The Judge went on to hold, at the invitation of counsel, that if he were in error in this construction, and a residential requirement was to be imported into the 1999 Act, the two electors in question both qualified by virtue of S26(1) of the 1998 Act. Section 26(1) provides:

"Electoral Rolls – (1) The Chief Registrar of Electors shall as far as practicable ensure:

(a) than an electoral roll is compiled and maintained for each constituency; and

(b) that every person qualified to be registered as an elector of a constituency shall, subject to the provisions of this Act, be entitled to have his or her name entered upon the roll of that constituency, and

(c) that every person who is qualified to be an elector of a constituency in the Cook Islands but has not resided in any one such constituency for a continuous period of three months shall be entitled to be registered in the constituency in which he or she spent the greatest part of his or her time during the period of three months immediately preceding the date of his or her application for registration."

Section 5 is certainly expressed in clear terms, and taken by itself limits the qualifications to those contained in s. 13 of the 1998 Act, "notwithstanding"

what else that Act may stipulate in that regard. The only residential qualifications contained in s. 13 relate to the Cook Islands in general, and are not directed to residency in a particular constituency. The effect of this construction is dramatic, in that it follows that every person who came under the umbrella of S. 13 (probably the vast majority of those residing in the Cook Islands) would be qualified to register and to vote. It is this extreme consequence which calls for a close consideration of the legislation, to see whether some residential qualification can be imported as a matter of construction.

The first argument for the appellant was that what can be termed the literal construction infringes the Constitution. It was submitted that this arises from the combined effect of Article 28(1)(b) and the definition of "to reside" in Article 1(1).

Article 28(1) provides:

> "Without limiting the provisions of any law prescribing any additional qualifications not inconsistent with any provision of this Constitution, a person shall be qualified to be an elector for the election of a Member of Parliament for any constituency other than the Overseas Constituency, if, and only, if –
>
> (a) He is a Commonwealth citizen, or he has the status of a permanent resident of the Cook Islands

as defined by Act; and

(b) He has been resident in the Cook Islands throughout the period of three months immediately preceding his application for enrolment as an elector and has not subsequently qualified as an elector under subclause (2) of this Article; and

(c) He has at some period actually resided continuously in the Cook islands for not less than 12 months."

Article 1(1) provides:

> In this Constitution unless the context otherwise requires:
> "To reside", in relation to the Cook Islands or to any constituency in the Cook Islands, means to have a usual place of abode in the Cook Islands, or, as the case may be, in that constituency, notwithstanding any temporary absence for the purpose of undergoing a course of education or of technical training or instruction, and notwithstanding any occasional absence, for any period not exceeding three months, for any other purpose and "resident" and "residing" have corresponding meanings."

It was contended by Ms Chen for the Appellant that it was therefore necessary for a person to have a place of abode within a particular constituency for three months before applying for enrolment in that constituency. We are unable to accept that submission. The Constitution does not itself contain any reference to a constituency which would attract

that part of the definition. It seems clear that reference to a constituency was inserted when the 1966 Electoral Act was amended in 1982 by substituting for its own definition of the phrase that contained in the Constitution, and by reason of the repeal of that Act is probably now superfluous because the 1998 Act contains its own internal definition. The purpose of Article 28(1) also seems clear, namely to define the minimum qualifications to be an elector in the Cook Islands. It is not concerned with identifying the electors for a particular constituency, and that is made clear by the reference to "any" constituency. The requirement for additional but not inconsistent qualifications for a particular constituency was to be a matter for the legislation. This is confirmed by Article 27(3), which states that subject to the provisions of the Constitution, the qualifications and disqualifications of electors shall be "as described by Act." It can be noted that it would also follow from the appellant's argument that s. 26(1)(c) of the 1998 Act would be unconstitutional because it could effectively reduce the three month residential requirement.

For the Chief Electoral Officer, Mr Manarangi submitted that the provisions of s. 5(1)(a) & (b) of the 1999 Act, in so far as in conjunction with s. 7 these gave entitlement to enrolment and to vote even if at the time of the by-election the Article 28(1) qualifications were not held, were unconstitutional. There is force in that submission, and it must follow that those provisions must be read as being subject to Article 28(1). There is however no cause to strike them down.

IS THERE A RESIDENTIAL REQUIREMENT?

The decision of Williams J, required as a matter of some urgency in the course of a far wider ranging inquiry than concerns this Court, and without the benefit of the full argument presented in this Court, is understandable.

The words of s. 5, on their face, appear to support the conclusion. But standing back, and looking at the overall scheme of the Constitution and that of the 1998 and 1999 Acts, it is necessary to make the latter operate in a sensible and practical way, and to ask whether a residential qualification is truly "contrary" to the principal Act.

There are strong pointers to the need for such a requirement.

First, the consequence already referred to, for which there appears to be no reason. To give such a right to Cook Islanders generally does not seem to be curing any mischief – certainly no such mischief has been identified. Second and importantly the Constitution, in Article 27 stipulates a Parliament of 25 members, elected by electors of identified islands, groups of islands, or areas. The number of members to be elected for each "constituency" is designated. The clear reference is that each electorate or constituency will have its own electors. Third, under s. 4(6) of the 1999 Act the provisions of Part III of the 1998 Act apply, with necessary modifications, to applications for registration and to registration as an elector. Part III governs the qualification of electors. It contains s. 13 already referred to. There are also provisions which, as would be expected, envisage residency in a constituency as being of prime importance. They include s. 12 which expresses the rules for determining residency within the Cook Islands. Section 16 envisages that application for registration will be made to the Registrar of a particular constituency. It also provides that if a registered elector on a constituency roll ceases to reside within that constituency, that person's name is to be removed from the roll (subs (5) (c)). Under s. 17 an elector residing within a constituency must notify any change of address. And s. 26(1)(c) expressly covers residency in a particular constituency.

When the background to the 1999 Act is taken into account and placed in the context of the electoral framework, in our view the compelling inference must be that residence in a constituency is a necessary qualification to be an elector in that constituency. Placed in that context, we do not see that the imposition of a residential qualification is in conflict with or prohibited by s. 5. In the same way, additional qualifications to those enunciated in Article 28(1) of the Constitution can be imposed on the elector. In either case, to do that does not run counter to, nor is it contrary to, the primary requirements of s. 13 or Article 28(1) as the case may be.

This conclusion is reinforced. In the course of argument, Mr Harrison for the first respondent accepted that it was permissible, and indeed necessary to import the concept of residency as a qualification. And Mr Manarangi in his submissions also contended for such a qualification. Their respective arguments effectively concentrated on defining the nature of that requirement.

DURATIONAL OR NON-DURATIONAL RESIDENCY?

It is important to keep in mind that this was to be a special roll, compiled only for the purposes of the by-election, and required any intending elector to make application for registration. The existing constituency roll was suspended. The amending Act was intended to give certainty, one of the problem areas previously having been that surrounding the eligibility to vote. The time frame was short, and there was a need therefore to ensure any drawn out process of investigation of qualification was avoided.

The 1998 Act, which was of general application and dealt with the ongoing process of maintaining electoral rolls in all constituencies, has its own problems. One of its significant features is that it contained no equivalent to

s. 8 of the 1966 Act, which specified the requirements to be an elector of a particular constituency. The 1998 Act by way of contrast, and not without significance as Williams J correctly emphasised, is virtually silent on this aspect. The only qualification expressed is that contained in S. 26(1)(c) which will require close consideration.

There are difficulties in the way of importing a non-durational residency requirement, namely that residence as at the date of application is all that is necessary. Residency is defined in s. 12. It is the usual place of abode (subs (3)), which is lost if left permanently (subs (5)). Throughout the Constitution and the 1998 Act, emphasis is laid on the period of three months when speaking of residency. Occasional absence for not less than three months does not matter (S. 12(3)(b)); if there is more than one place of abode, residence is where the greater time in the three months preceding enrolment has been spent; three months residency in the Cook Islands in the three months preceding application is required under the Constitution (Art. 28(1)); Section 26(1)(c) of the 1998 Act speaks of the three month period; the 1966 Act required three months residency for qualification in a constituency; that same concept has now been carried through to the 2001 amendment. To now hold that residency simply at the one point of time, namely application for registration, would seem to run counter to the whole scheme. Duration is clearly of some importance.

This leads to what is a critical aspect of this appeal – to determine the nature of the durational requirement. As has already been mentioned, the only express reference to the residential qualification entitling registration in a particular constituency is s. 26(1)(c). Although it is worded as imposing a duty on the Chief Registrar of Electors, the provision gives an entitlement to registration. It is identical to s. 9 of the 1966 Act as amended in 1982, when

a new s. 8 residential qualification which remained until the Act was repealed in 1998, was introduced.

Williams J held that both electors now in question qualified under S. 26(1)(c). A the time of application for registration, each was resident in Pukapuka, and had spent the greatest part of the preceding three months in Pukapuka. Ms Chen challenged that finding as being erroneous in law, contending that the subsection had no application because these were both persons who had continuously resided in a constituency (Rarotonga and Rakahanga respectively) for three months.

Having regard to the background leading up to the 1999 Act and its purposes, one of which was to give certainty to the compilation of a completely new roll, we take the view that the reference in the subsection to not having resided in a constituency for a continuous period of three months must be construed as defining the period immediately preceding the application for registration. If the period is unrestricted as to when the period may have run, it becomes difficult to understand. A person may have had a three months residence in one constituency, left it permanently some considerable time before and therefore lost residency and entitlement to be on that roll, but not resided for three months continuously in another constituency thereafter. That person would then be disenfranchised , notwithstanding a Constitutional entitlement to be registered as an elector. This kind of difficulty can only be overcome by construing the words as referring to residency in a constituency which gives the elector an existing and continuing entitlement to registration in that constituency. Importantly however, that would require giving the provision a qualified meaning which it cannot bear without substantially reforming it.

Outside s. 26(1)(c), there is no avenue to turn to in order to ascertain what is the qualification for registration, and on the appellant's argument it becomes

necessary to imply an entirely separate provision to the effect that three months residence from the date of application is required. That must be in addition to adding to or modifying the first part of s. 26(1)(c) itself. We do not think that is warranted – particularly in the case of the special roll being set up under the 1999 Act.

The important point of time must be the date of application for registration. It is a simple and straightforward question to determine whether a person who then has Pukapuka or Nassau as the place of abode, has also spent the greater part of the preceding three months in that place. On this basis the subsection provides the criteria for qualification. The only implication necessary is the obvious corollary that residency in the constituency over the three months preceding application for registration satisfied the requirement. Such a construction gives practical sense to the provision, and is not in conflict with any discernible legislative intent. It can also be observed that to adopt this approach is in accord with the 2001 amending Act.

In the course of argument it was suggested that this construction of para (c) rendered the first part which has just been under discussion superfluous, thereby negating that construction. That consequence does not follow. The draftsman has employed a particular technique. A person who has so resided the previous three months qualifies; so does a person who has not so resided, but has still spent the greater part of that time there. The technique is identical to that adopted in s. 8(d) of the 1966 Act, and again in the new s. 13A of the 1998 Act inserted by the 2001 amendment. The same criticism could be made of those provisions.

CONCLUSION

Although differing from Williams J on the construction of s.5 of the Electoral Amendment (No. 2) Act 1999, we agree with his conclusions as to the application of s. 26(1) (c) of the Electoral Act 1998. The determination of the High Court of 23 March 2001 was therefore correct, and the appeal is accordingly dismissed. The respondents are entitled to costs. These are fixed in the sum of $3000 for the first respondent and $2000 for the second respondent, together with disbursements to be determined by the Registrar if necessary.

CHIEF JUSTICE **JUDGE** **JUDGE**