IN THE HIGH COURT OF THE COOK ISLANDS
[illegible]
(CR [illegible])

CA No. 14/99

IN THE MATTER OF The Parliamentary Judgments Act 1908

AND

IN THE MATTER OF The Electoral Act 1998

BETWEEN TAGGY TANGUNGTUA
Of Rarotonga, Chief Registrar of Electors

Applicant

AND IMATTO AKARURU
Of Pukapuka. Candidate for Pukapuka/Nassau constituency

First Respondent

AND Tiaki Wuatai of Pukapuka, Candidate for Pukapuka/Nassau constituency

Second Respondent

Counsel: Miss Janet Maki (Solicitor-General) for Applicants
Mrs. Tina Browne for First Respondent
Mr. M.C.Mitchell for Second Respondent.

Judgment: 18 October 1999

JUDGMENT OF QUILLIAM J.

The Applicant, who is the Chief Registrar of Electors, has applied for a declaratory order to determine questions concerning the interpretation to be given to several sections of the Electoral Act 1998 ("the Act").

Following the General Election held on 16 June 1999, and as the result of an election petition in respect of the voting in the constituency of Pukapuka/Nassau, the Court of Appeal directed pursuant to s.76 of the Act the holding of a by-election in that constituency. That by-election was held on 29 September 1999. The present application has been made by the Applicant in order to enable the result of the by-election to be determined and declared.

For the purposes of the application I am obliged to

assume that the facts alleged in the Statement of Claim which has been filed will be capable of proof. In other respects the findings of fact must be those to be made by the Applicant in the light of the answers given to the questions asked in the application. I accordingly set out the facts as previously alleged.

The date of closure of the electoral roll for the by-election in this constituency was 10 September 1999. A notice was given by the Applicant advising electors that the last day for receiving objections to electors on the electoral roll was 13 September 1999. Prior to that date the Applicant received objections to a total of 24 enrolled electors on the grounds that each of them was not qualified to be registered on the roll. The grounds for those objections were that the particular electors had been absent from the constituency for a period of more than 3 months for reasons other than for the purpose of undergoing a course of education or technical training or instruction.

The period considered by the Applicant in determining the question of 3 months absence was the period preceding the date of the closure of the roll on 10 September 1999.

Some of the electors (listed as Group A in the Schedule to the Statement of Claim) had been away for more than 3 months for the purpose of seeking medical treatment.

The names of all the electors listed in the Statement of Claim were removed from the roll on the grounds of absence from the constituency for more than 3 months. They were, however, given the opportunity to vote by way of declaration pursuant to s.59 of the Act.

In the present application, theApplicant seeks a declaratory order:

> "determining questions as to the construction of sections 12,16,18,26(1)(c),23(3) and 59 of the Electoral Act 1998 ("the Act") in respect of the by-election held in the Pukapuka/Nassau constituency on 19 September 1999 ("the by-election"), specifically:
>
> (1) Given that the grounds for objection to the persons listed in the Schedule to the Statement of Claim are:
>
> (a) that they have been absent from the constituency of Pukapuka/Nassau for more than 3 months; or
> (b) that they have spent the greatest part of the period of 3 months prior to the closure of the roll for the by-election in a constituency other than Pukapuka/Nassau,
>
> Are they qualified to vote in the by-election?
>
> (2) Is section 12(3)(c) of the Act unconstitutional?
>
> (3) Given that the Act refers to the 3 month period

"preceding the date of his or her application for registration" for enrolment, for the purposes of the by-election can the Applicant, pursuant to section 32(3) of the Act, "modify" this requirement by stating that the relevant time is the 3 month period preceding the date of the closure of the roll:

(4) Can the Applicant ignore objections to electors received after 13 September 1999, being the date which electors were advised was the last day for receiving objections:

(5) If an elector's name has been removed from the electoral roll pursuant to section 21 of the Act, can he or she still vote by way of declaration pursuant to section 59 of the Act..."

I deal with these questions in turn, but in doing so I am unable to give the reasons in as much detail as might otherwise be expected. A decision on this matter is required as a matter of urgency because of the present volatile state of numbers of elected Members of Parliament and the uncertainty as to which party or coalition of parties is able to form a government.

The Electoral Act 1998 is expressed in confusing and unsatisfactory terms. It needs revision and re-drafting, but it is not possible for me in the time available and within the scope of this Judgment to do more than make these general observations.

Question 1.

The grounds for objection to each of the 24 electors listed in the Schedule to the Statement of Claim is stated to have been "that they have been absent from the ...constituency for a period of more than 3 months for reasons other than for the purpose of undergoing a course of education or technical training or instruction".

The qualification to be an elector for any constituency other than the Overseas Constituency is determined in the first instance by reference to Article 28 of the Constitution which, so far as is relevant for present purposes, provides:

"28 (1). Without limiting the provisions of any law prescribing any additional qualifications not inconsistent with the provisions of this Constitution, a person shall be qualified to be an elector....if and only if -

(b) He has been resident in the Cook Islands throughout the period of three months immediately preceding his application for enrolment..."

The definition of "to reside" is contained in Article 1(1) of the Constitution, namely:

"To reside", in relation to the Cook Islands or 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, notwithstanding any occasional absence for any period not exceeding 3 months, for any other purpose, and "resident" and "residing" have corresponding meanings."

Section 12 of the Electoral Act purports to set out the rules for determining place of residence within the Cook Islands and, in subsec. (3) provides:

> "(3) A person shall be deemed to reside where that person has a usual place of abode notwithstanding;
>
> (a) any temporary absence for the purpose of undergoing a course of education or of technical training or instruction; or
>
> (b) any occasional absence for any period not exceeding 3 months for any other purposes; or
>
> (c) any temporary absence for the purpose of undergoing medical treatment or being required to accompany an immediate family member or relative for the purpose of undergoing medical treatment."

So far as concerns the question of temporary absences from the usual place of abode, it is at once apparent that paras. (a) and (b) set out above simply repeat the provisions of Article 1 (1). Para. (c), however, introduces a new exception and in so doing purports to broaden the definition of "to reside". The result is to introduce an exception which is inconsistent with the Constitution and accordingly, having regard to Article 28 (1),can have no validity.

It follows that, in determining whether the objections to the enrolment of those persons listed in the Schedule to the Statement of Claim should be allowed or not, the Applicant is obliged first to determine the person's "usual place of abode", and in that regard I can do no better than adopt the definition given by the Full Court of the High Court of New Zealand in Re Wairarapa Election Petition (1988) 2 NZLR 74 as "a place where a person for the time being, other than for a very brief stay, sleeps and eats and which in general he uses as a place for his daily activities". The Applicant is then required to consider whether a period of absence was for the purpose of undergoing a course of education or of technical training or instruction (s.12(3)(a)), or did not exceed 3 months for any other purposes (s.12(3)(b)). The Applicant is obliged to disregard any absence for medical treatment or for accompanying an immediate relative for medical treatment unless that should fall within the provisions of s. 12 (3)(b) ("other purposes") and did not exceed 3 months.

These determinations are, of course, to be made by the Applicant in the light of the evidence available, and not by the Court which has no evidence before it.

Question 2.

Having regard to the findings set out in Question 1 the answer to Question 2 must be in the affirmative, and it should be observed that no counsel offered a submission to the contrary.

Qustion 3.

This question concerns the way in which the period of 3 months during which a temporary absence is to be assessed is to be calculated.

For the purposes of the continuing roll of electors contemplated by s. 16 of the Act the 3 month period of residence in the Cook Islands provided by s. 13(e) is that period immediately preceding the application for enrolment as an elector. No separate provision appears in the Act in respect of by-elections. Similarly, for the purposes of the compiling of the electoral roll s. 26(1)(c) provides for the appropriate constituency to be determined by reference to the length of residence during the 3 month period immediately preceding the date of application for registration. Again, provision for a by-election does not appear to have been contemplated and, depending on how long such a by-election is held after a general election, the calculation by reference to the date of registration would seem to be altogether unreal.

The provisions just referred to are consistent with Article 28 (1) of the Constitution which I have set out earlier but that does not assist in the case of a by-election.

Section 32, which deals with by-elections, does not help to resolve this matter. It provides for the Chief Electoral Officer to give public notice appointing a day for the by-election and subsection (3) provides that in the event that the Court directs pursuant to s. 76 of the Act that a by-election be held (which is the situation here)"the provisions of subsections (1) and (2) of this section shall with all necessary modifications apply".

Counsel for the Applicant and for the Second Respondent agree that that provision is not applicable in the present circumstances, and I take a similar view.

Counsel for the First Respondent submitted that, as the Act had failed to provide for this situation in the case of a by-election, the result was a nonsense and therefore the Chief Electoral Officer was entitled to fill the gap by making a "modification" in terms of s. 32(2). I am unable to agree. All that s. 32 authorises the Chief Electoral Officer to do in the case of a by-election directed under s.76 is "to appoint a day for a by-election to fill the vacancy". I can see no basis on which it can be said that departing from the express provisions of the Act as to the 3 month period can be justified as a "modification".

It was further submitted for the First Respondent that the Chief Electoral Officer could fill the gap by exercising

the discretion given under s.112 of the Act. That section, however, is in my view designed to correct irregularities which may occur in the course of an election and cannot extend to basic procedures for which express provision is made in the Act.

I accordingly conclude that Question 3 must be answered in the negative.

The Applicant is obliged, in considering the temporary absence of electors, to do so by reference in each case to the period of 3 months immediately preceding the date of registration rather than the period preceding the date of closure of the rolls.

A further matter which may affect Question 3 concerns the procedure provided in the Act in respect of objections. This is contained in ss.20, 21,22, and 23. In brief, it involves notice being given by the Registrar to the elector objected to and the right of such elector to provide evidence of his or her eligibility to be on the roll.

Although counsel have suggested that this procedure may not have been followed, there is no evidence in the present proceeding as to this. If it was not followed, then I can see no basis on which the name of such an elector can be removed from the roll. This is a matter upon which the Applicant will be required to make a decision.

Question 4.

Section 19 of the Act which makes provision as to objections is explicit. It provides that an objection to an elector may be made "at any time". In respect of this by-election all electors were advised (presumably by public notice) that the last day for receiving objections was 13 September 1999. Three objections were received after that date but were disregarded as being out of time.

It was argued for theApplicant that the fixing of an arbitrary date for objections was a practical step and as such was within the discretion of the Chief Electoral Officer under s. 112 of the Act. I can see no basis upon which that section can apply. This was not a question of anything done or omitted irregularly, but of a requirement made which was contrary to the express provision of the statute.

This question also must be answered in the negative.

Question 5.

Section 21 of the Act empowers the Registrar to remove from the roll the name of an elector objected to, but only after the prescribed notice of the objection has been given and the elector objected to has failed to provide evidence of eligibility or has consented to removal. As already indicated, I have no means of knowing whether in any particular case this procedure was followed. If it was not, there was no jurisdiction to remove the name from the roll. If, in respect of any elector objected to, the objection was disallowed then the elector's name should have remained on

the roll.

Section 23 provides for the case of an elector who is dissatisfied with the decision to remove his or her name from the roll and provides that such person has the right, through the Chief Registrar of Electors, to refer the objection to the Court. That is not the situation in the present proceeding.

Section 59 provides for an elector who believes him or herself to be entitled to be registered but whose name is not on the roll to make a declaration vote. This is a different situation from that contemplated by ss.20 to 23. As already noted, a person whose name has been removed from the roll under s.21 has the right to challenge that removal in the Court. Section 59 can have no application to that situation.

The answer to this question must therefore be in the negative.

SUMMARY.

The short answers to the questions in the application are:

1. If an elector to whom objection has been taken is found to have been absent from the constituency otherwise than as provided in s.12 (3)(a) or (b) of the Act then that elector was not qualified to vote in that by-election.

2. Yes.

3. No.

4. No.

5. No.

Finally, it is necessary to stress that this is not a proceeding in which there has been any evidence given and so there can be no conclusive finding in respect of any particular elector. It is now for the Applicant, applying the principles set out above, to determine the relevant facts in order to make a decision in respect of each of the electors to whom objection has been made.

The question of costs is reserved.

J. Williams J.