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

Misc 55/04

IN THE MATTER	of an election of Members of Parliament of the Cook Islands to be held on the 07th September 2004
A N D	
IN THE MATTER	of Section 28 of the Electoral Act 2004
BETWEEN	**TAKAKE AKATAPURIA** of Omoka, Penrhyn, a registered elector for the constituency of Penrhyn
	Applicant
A N D	**TEANAU TARIPO** Registrar of the constituency of Penrhyn
	First Respondent
A N D	**BRIAN TERRENCE HAGAN** Chief Registrar of Electors
	Second Respondent
Hearing:	10 August 2003
Appearances:	Mr C Little for Applicant Mr J McFadzien for First and Second Respondents Mrs T Browne for challenged Electors
Date of Decision:	13 August 2004

DECISION OF DAVID WILLIAMS J

Solicitors

For Applicant:	W.O.P. Rasmussen, Kiikii, Tupapa, Rarotonga
For Respondents:	McFadzien PC, 1st Floor, Browne's Building, Main Road, Avarua, Rarotonga, Cook Islands.
For Electors:	Charles Little PC, Avarua, Rarotonga, Cook Islands

1. INTRODUCTION – NATURE OF THE APPEAL

1.1. This is an appeal under section 28 of the Electoral Act 2004 seeking a review of the decision of the First Respondent as registrar of the Penrhyn Constituency rejecting the objections by the Applicant against the following electors whose names appear on the Penrhyn Supplementary Roll:

ANESI TAOM Mataatari

KAITANGI Nukuroa Matatari

MAIRERIKI Teiho Teiho

MARSTERS Matasa

MERRETT Graham

TAIME Hanapo

TAUTU Marama

WILLIAM Banaba Tuanua

1.2. As to procedural formalities, subject to one matter mentioned below, the appeal was in order. There was no dispute as to the standing of the Applicant to bring the appeal under section 28. There was no doubt that the appeal had been brought within seven days of the Registrar's decision being made. The Main Roll closed on 22 June 2004. The Supplementary Roll opened on 23 June and closed on 6 July 2004. It was published on 13 July 2004. The objections to the Supplementary Roll were filed on 13 July 2004. The decisions of the Registrar were dated 20 and 21 July 2004. The appeal was filed on 27 July 2004.

1.3. The matter came before me by way of a telephone conference on Saturday 7 August. It became apparent that the appeal was not ready for hearing. Counsel for the Electors had lodged two written submissions dated 6 August which had been received by counsel for Applicant only a short time before the telephone conference commenced. He needed time to consider those submissions. Additionally, counsel for the First and Second Respondents pointed out that there would be some difficulty in deciding some of the cases because they depended upon information from the Teachers' Training College in Rarotonga about dates upon which certain of the electors had applied for admission to that institution. The Court was informed that the principal of the Training College was reluctant to release any confidential information concerning present or past students of the College. At the request of

counsel for the First and Second Respondents, I issued summonses to the principal of the College directing her to produce the relevant information. I further directed that all parties file further written evidence and submissions and set the matter down for hearing on 10 August 2004.

1.4. Mrs Hodges, the principal of the Teachers' Training College, was present at the outset of the hearing on 10 August. The Court explained to her the need to have the relevant information from her records in order to determine whether certain electors were entitled to vote. The Court accepted the correctness of her decision initially to refuse to release the information on the grounds of confidentiality and noted that she had taken the proper course in waiting for a Court Order to produce the documents. The Court expressed its appreciation for the assistance received from Mrs Hodges.

2. PRELIMINARY PROCEDURAL OBJECTION BY APPLICANT

2.1. In her written submissions of 6 August, the Counsel for the Applicant noted that all of the electors objected to, except for Graham Merrett and Anesi Taom Mataatari, were removed from the previous roll by the Registrar pursuant to section 20(4). It was further noted that section 20(5) required the Registrar to give notice of such removal to the elector affected (where practicable) within five workings days of such removal in which case the elector may apply to the Chief Registrar of Electors who shall either approve or reject the application pursuant to section 20(3). It was submitted that except for Maireriki Teiho Teiho, that procedure had not been followed. It was therefore argued that the Registrar had no authority to subsequently have those persons included on the Supplementary Roll.

2.2. Counsel for the Respondents replied to those submissions in his written submissions dated 7 August 2004 as follows:

> "1. **Section 20 removals:**
>
> (a) Reference is made to the submissions dated 6th August 2004 filed by Mrs. Browne, acting (in this case) for the Applicant.
>
> (b) It is conceded that electors may have been removed from the main roll pursuant to section 20(4) without the notices required by section 20(5) being sent to the elector's last known address in the constituency.
>
> (c) The procedure that appears to have been followed, is that the Registrar in Penrhyn removed the names, but on referring the particulars to Rarotonga Electoral Office and upon taking advice from that office, the names were re-instated as if they had not been removed in the first place.

The attached (**Document 1**) evidences that process. The main roll was by then closed and so the names were placed on the supplementary roll.

(d) The Applicant contends, notwithstanding that notice was not given under section 20(5) of the removal, that the electors in question were nonetheless removed and since they did not complete an application to re-enrol, they are not entitled to be on any roll, except for the three referred to in paragraph 18 of Mrs. Browne's submissions, subject to the outcome of the appeal process now before the Court.

(e) To remove the electors in question, through no fault of their own would be an unfair and unjust result. Any purported removal from the main roll in respect of any elector the subject of these proceedings ought to be regarded as being of no effect due to the non-compliance with section 20(5)."

2.3. At the hearing on 10 August on instructions, counsel for the Applicant counsel for the Applicant maintained her submissions, notwithstanding this response from counsel for the Respondents. However, she did not press the argument strongly. The Court agrees with the submission of Mr McFadzien especially for the reasons given in his paragraph (e). The contentions of the Applicant are not sustained.

3. APPROACH TO BE TAKEN IN RESPECT OF SECTION 7(6) ELECTORAL ACT 2004.

3.1. Section 7(4) provides that a qualified elector is disqualified from being an elector if subsequently absent form the relevant constituency for a continuous period of three months.

3.2. This is subject to section 7(6) which provides as follows:

> "(6) The following shall not be regarded or treated as a period of absence from the Cook Islands or from a constituency as the case may be for the purposes of subsection (4) -
>
> (a) any continuous period not exceeding 4 years spent by a person outside of the constituency for the purpose of-
>
> (i) receiving education, technical training or technical instruction; or
>
> (ii) receiving medical treatment
>
> (b) any period spent by a person outside the constituency as
>
> (i) a member of a Cook Islands diplomatic or consular mission outside of the Cook Islands; or
>
> (ii) a spouse, partner or member of the household of a person referred to in subparagraph (i); or
>
> (c) any occasional absence for any purpose, for a period not exceeding 3 months.

3.3. In approaching these matters, I bear in mind the observations in the recent decision of the Chief Justice in *Kairua v Solomoana and Hagan* OA 14/2004 (the Manihiki constituency case as to the way in which section 7(6) of the Electoral Act 2004 is to be approached. The Chief Justice said, inter alia :

> "[9]. ... The onus of response to the objection is on the elector objected to. The objector must respond within seven days of the notice of the objection and satisfy the registrar of eligibility to be on the roll. On review, that onus must remain to satisfy the Court that the elector is eligible to be on the roll.
>
> [10] The real issue is the meaning and import of the subsection. On the one hand it is said that the meaning is that the absence must be for the purpose of medical treatment and that takes effect from departure. It does not cover absence which occurs after some subsequent event or diagnosis following departure and absence for other non-qualifying reasons. The contrary argument is that the absence may begin when the medical treatment is required. That the clock stops, the time stops running, during an absence when the purpose of medical treatment intervenes and does not start again till that treatment ceases or four years elapses.
>
> [11] The underlying reasons for this allowance of absence is that in the Cook Islands or in the outer islands there is an absence of educational and medical facilities. Electors are compelled to travel away from the constituency for these purposes. The absence is, in terms, for the purpose of medical treatment or education. A person who has gone for some other purpose does not remain absent for medical purposes. The absence continues because of some event or diagnosis and for the reason or the benefit of medical treatment. It is not then a continuous period of absence for the purpose of medical treatment but partly for some other purpose and thereafter for medical reasons. I consider that the true meaning is that the absence to qualify for this special treatment must have the purpose, at the outset and for the continuous period of it, of medical treatment. The contrary argument does not take account of the references to continuity and to purpose which encapsulate the underlying intention and meaning of the provision."

3.4. I respectfully agree with these observations and I shall adopt the same approach in relation to the cases presently before me.

4. THE ELECTORS OBJECTED AGAINST

4.1. At the outset of the hearing on 10 August counsel for the electors advised that, having carefully reviewed the additional evidence placed before the Court, it was now conceded that in the cases of Anesi Taom, Kaitangi, Merrett and Taime, they were not qualified. Counsel for the First and Second Respondents made no submission to the contrary. The Court accordingly rules that the names of those electors be removed from the Penrhyn Supplementary Roll.

Teiho Teiho MAIRERIKI

4.2. Having considered the statements of the elector dated 14th July 2004 and 7 August 2004 and all other relevant documentation I find the circumstances to be as follows. Mr Maireriki left Penrhyn for Rarotonga in the latter half of 1999. Until his departure from Penrhyn he worked for the Ministry of Marine Resources. When he arrived in Rarotonga he continued to work for the Ministry of Marine Resources until February 2000. He became a trainee at Teachers' Training College more than three months after arriving in Rarotonga. The Elector had a motor accident in August 2001 and was referred to New Zealand for medical treatment which, he says, he is still receiving. The College was not able to produce any documentation relating to him, although summonsed to do so. If the elector left Penrhyn in 1999 for a reason other than to undergo training, the position by early 2000, after the expiration of three months from the date of his departure from Penrhyn, would be that he already had become disqualified under section 7(4). In that case medical evidence relating to the accident in August 2001 would be of no relevance.

4.3. In this second statement of 7 August 2004 the elector claimed that the applied for Teachers' Training College from Penrhyn in or about 1999. The crucial question therefore is whether at the time when the elector left Penhryn the departure was for the sole purpose of going to Rarotonga to undertake an educational course or whether he decided upon a teaching career only after reaching Rarotonga. The onus is on the elector. The absence of any record of an application by the elector to the Teachers' College in 1999 is striking. Because of the absence of such evidence, I find that the elector is not qualified to be on the Penhryn Roll. He may well qualify for the Nikau constituency on Rarotonga but that is not for me to decide.

Matasa MARSTERS

4.4. This young woman travelled from Penrhyn to Rarotonga in February 2004 to give birth to her first child. The Outer Islands patient referral form stated as the reason for referral to the Rarotonga Hospital "anti-natal primigravida". The latter word is a noun meaning a woman who is pregnant for the first time. The form is devoid of any reference to medical difficulties or problems in the pregnancy. I find that the reference was not one involving medical treatment. She was referred simply because it was a desirable precaution for a young person having her first child.

4.5. After her child was born she and her child travelled to Australia in May 2004. There was produced an Air New Zealand travel certificate issued prior to her journey to Australia in which a doctor certified that she was a healthy mother and there had been no complications in her pregnancy. A certificate from an Australian medical centre dated 20th of July 2004 recorded that Ms Marsters had attended the surgery but stated only that she was suffering from "pregnancy". The certificate referred to the baby suffering from pre-natal cysts and it advised that the baby needed to be seen by a haematologist.

4.6. The elector had been away from Penrhyn and out of the Cook Islands for more than three months before the registrations from the Penrhyn Main Roll began. The Court finds that she has not brought herself within the medical treatment exception in clause 7(6)(a)(ii). Her name should thus be deleted from the Penrhyn Supplementary Roll.

Marama TAUTU

4.7. The documentary evidence indicated that this man was referred as a patient from Penrhyn to Rarotonga on 9 September 2002 for an eye operation. He was seen by an eye specialist for his eye problem in Rarotonga. The evidence from the Ministry of Health show that he went to New Zealand on the 8th of November 2002 "for his eye problem". There was a medical report dated 22nd of October 2003 from the Auckland District Health Board confirming that he had surgery in Auckland towards the end of 2002 and indicating all problems had not been removed. A report dated 30th of July 2004 from Counties Manukau Hospital stated that following a retinal detachment last year Mr Tautu had been virtually blind and was now complaining of poor vision in his left eye and further problems appear to be developing. In a statement dated 7th of August the elector stated that the only reason he had stayed in New Zealand and continued to stay in New Zealand was because he is receiving medical treatment for his eyes. In my view there is sufficient evidence of ongoing treatment to justify his retention on the roll. Counsel for the applicant conceded that this was so. Therefore in respect of this elector the application is dismissed and he shall remain on the roll.

Banaba Tuanua WILLIAM

4.8. Documentary evidence demonstrated that this elector was referred as a patient from Penrhyn to Rarotonga in October 2002 suffering memory loss and that he was referred on to Auckland in November 2002 suffering from transient ischaemia (a

reduction of blood supply to part of the body). The only question here is whether there is adequate evidence of continuing treatment to this day. Counsel for the electors had difficulty in obtaining confirmatory evidence on this point because the elector is now in Australia and the relevant Auckland hospital was unwilling to provide information without the elector's consent. There were difficulties in contacting the elector in Australia within the time available to procure his consent. The elector lives with his father in Auckland. The best that could be put forward was a statement by the father dated 9th of August which said inter alia:

> "I confirm my son was referred from Penrhyn to Rarotonga for medical treatment on 22nd of October 2002 and then he was referred to Auckland New Zealand on 21 November 2002 for further medical treatment. The only reason my son has stayed in New Zealand to date and continues to stay in New Zealand is because he is still receiving medical treatment. He usually has medical appointments at the Middlemore Hospital in Auckland weekly. I further confirm my son is of sound mind."

4.9. This is a borderline case especially in view of the absence of any subsequent medical records to confirm continuing treatment. However, the father's statement is sufficient to persuade me that the son comes within the exception in section 7(6)(a)(ii). Mr William shall remain on the Roll.

5. CONCLUDING OBSERVATIONS

5.1. It will be apparent from some of the cases dealt with on this appeal and another Penrhyn appeal referred to me that the urgency which necessarily attends appeals under section 28 of the Electoral Act 2004 (appeals to be brought within 7 days of the Registrar's decision – need for urgent Court decision because of the imminence of the election) has created difficulties for the participants in these appeals. It is possible that if more time had been available medical evidence may have been able to be adduced in some of the cases which could have resulted in a much more clear cut decision on the issue of the applicability of the exceptions in section 7(6). Counsel for the Respondents may wish to draw this issue to the attention of the relevant authorities in case it is considered that some modifications to the timescale under the Act might be worthy of consideration.

6. RESULT – COSTS

6.1. The electors listed in paragraph 4.1 shall be removed from the Penrhyn Roll.

6.2. (i) Teiho Teiho Maireriki is not qualified to be on the Penrhyn Roll and shall be removed from that Roll.

(ii) Matasa Marsters is not qualified to be on the Penrhyn Roll and shall be removed from that Roll.

(iii) Marama Tautu is entitled to remain on the Penrhyn Roll.

(iv) Banaba Tuanua William is entitled to remain on the Penrhyn Roll.

6.3. Leave is reserved to any party to apply on 24 hours notice in relation to any consequential matters arising out of paragraph 6.1 and 6.2.

6.4. Since this in the nature of a public interest matter, and in any event, neither of the competing parties has had complete success, it is not appropriate to make any orders for costs in this case.

6.5. May I conclude by expressing my thanks to all counsel for the clarity and excellence of their submissions which were, of course, prepared under heavy time pressures. In addition, I am most grateful to counsel for the First and Second Respondents for his very helpful general submissions on the structure of the new Electoral Act 2004 which were sent to me at an early stage and provided much enlightenment on the legislative history of that Act and its predecessors.

SIGNED at Auckland on the 16th day of August 2004 at 2.30 pm

DAVID WILLIAMS J