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

MISC NO. 111/2010
[TAMARUA]

IN THE MATTER	of the election of the Member of Parliament for the Constituency of Tamarua, Mangaia, held on Wednesday, 17 November 2010
AND	
IN THE MATTER	of Section 92 of the Electoral Act 2004
AND	
IN THE MATTER	of Sections 7(4) and 20(4) of the Electoral Act 2004
BETWEEN	**ANDY MATAPO**
	Petitioner
AND	**PUKEITI PUKEITI**
	First Respondent
AND	**TAGGY TANGIMETUA**
	Second Respondent
AND	**MARK TEREI SHORT**
	Third Respondent

Hearing: 31 January 2011
(Held in Mangaia)

Counsel: Mrs T Browne for Petitioner
Mr P Lynch for First Respondent
Mr H Matysik for Second and Third Respondents

Judgment: 31 January 2011

ORAL JUDGMENT OF THE HON. WESTON CJ

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P Lynch, Paul Lynch Consulting Ltd, Ngatangiia Rarotonga (blvilla1@oyster.net.ck)
H Matysik, Little & Matysik PC, Maraerenga, Avarua, Rarotonga (heinz@lawyers.co.ck)

[1] This Petition arises out of the General Election on 17 November 2010. Mr Pukeiti was declared to be the Member of Parliament for the Tamarua constituency in a Public Notice dated 24 November 2010. His winning margin was very slim. He received 31 votes. Mr Matapo, who is the Petitioner, received 30 votes.

[2] Mr Matapo brought an Election Petition. The amended Petition, which is dated 17 December 2010, raises qualification issues in relation to two electors, being Mrs Rongomate Tumarama and Mr Naimate Ngauora. It is common ground that both of these electors were absent from the relevant constituency for a period in excess of three months. For Mrs Tumarama the absence commenced on 29 April 2010 and went through until 21 September 2010. For Mr Ngauora it was 31 March 2010 until 29 October 2010.

[3] The primary issue for decision today is whether their absences from the constituency are excused by s 7(6)(a)(ii) of the Electoral Act 2004 ("the Act"). There is also a subsidiary issue raised by Mr Matysik in relation to s 7(6)(c), which I will come to at the end of this decision. In addition to the Petition itself, and in response to it, there is a counter-Petition. At the point of delivering this decision I have not heard evidence in relation to it. The parties proceeded on the basis that I should address the Petition first and deliver this decision.

The law

[4] Section 7 of the Act is to be read in conjunction with parts of the Constitution. This is explained in more detail in a Court of Appeal decision *Wigmore v Matapo*.[1] Sections 7(4) and 7(6) state:

> **7. Qualifications for registration of electors**
>
> ...

[1] *Wigmore v Matapo* CA 14/2004, 19 August 2005, at [100].

(4) A person who meets the qualifications imposed by subsection (1) or who requalifies under subsection (5), is disqualified from being an elector, or as an elector for a particular constituency if the person is subsequently absent from the Cook Islands or from the particular constituency for a continuous period exceeding 3 months.

...

(6) The following shall not be regarded or treated as a period of absence from the Cook Islands or from a constituency as he 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 exceeding3 months.

[5] In short, s 7(4) provides that an elector is disqualified if absent from the Cook Islands or a particular constituency for a continuous period exceeding three months. Section 7(6)(a)(ii) then provides that an absence that otherwise is captured by s 7(4) does not count as an absence if it is for the purpose of receiving medical treatment.

[6] Both of the parties referred me to the decision of Williams J given in 2004: *Akatapuria v Taripo & Ors.*[2] At paragraph 3.3 of that decision his Honour set out an extract from the (then) recent decision of the then Chief Justice in *Kairua v Solomoana and Hagan.*[3] Williams J referred to paragraphs [9], [10] and [11] from the Chief Justice's decision, and I set those out below:

[2] *Akatapuria v Taripo & Ors* HC Rarotonga, Misc 55/04, 13 August 2004, David Williams J.

[3] *Kairua v Solomoana and Hagan* High Court Rarotonga, OA 14/2004, 2 August 2004, Greig CJ.

> [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 this 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 steps, 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.

Williams J respectfully agreed with the observations of the Chief Justice and adopted them in the case before him.

[7] This decision of the Chief Justice, together with that of Williams J, is not strictly binding on this Court, but nevertheless it is to be regarded as highly persuasive and, for myself, I do approach it in that way. On the other hand, it is important to bear in mind the context that the issues in the case before Williams J concerned electors who had left for one purpose, not being a purpose within the Act, but subsequently argued that they fell within the exceptions to the Act because they were receiving medical treatment. The situation before the Court today is different.

[8] Mr Matysik made the point in submission that the key *"purpose"*, insofar as s 7(6)(a)(ii) is concerned, is that of the elector. I agree. In effect, that must be a

subjective purpose or purpose analysed from the viewpoint of the elector. It does not necessarily need to be a reasonable purpose. If we take the receiving of education as an example, it cannot have been required in all cases that the elector follow a particular course of education, pass all courses that are sat, or otherwise meet some standard that an objective bystander might require. What the Act focuses on is the purpose of the elector to undertake education for a period not exceeding four years. Having said that, if the elector's actions are unreasonable, assessed objectively, that may be relevant to an assessment of the elector's purpose. The claimed course of education cannot be a disguise for some other purpose.

[9] I believe a similar sort of approach should be taken in relation to medical treatment. The purpose with which the Act is concerned is that of the elector in receiving medical treatment. Mr Matysik emphasised that it need not be a formal referral and Mrs Browne agreed with that. I also agree. It is not necessary, therefore, that the person receive medical treatment as a result of a formal referral by the Health Authority in the Cook Islands. It can be a self-referral as well. The issue then is whether the person's continuous absence is explained by their purpose of receiving medical treatment. As the Chief Justice in *Kairua v Solomoana and Hagan* recognised, there is an absence of educational and medical facilities in the Cook Islands, and especially the outer islands. Electors can be compelled to travel away from their constituency for these reasons or they may choose to do so.

[10] I think it is useful now to explore the facts of the two challenges before reaching a final conclusion.

The facts: Mrs Tumarama

[11] I start with Mrs Tumarama. I am satisfied that at the time she left for New Zealand on 29 April 2010 she had the purpose of receiving medical treatment. There was no other reason given for her departure for New Zealand. The follow-up appointment on 1 June 2010 is, in my opinion, *"medical treatment"* within the contemplation of the Act. Mrs Tumarama had had an operation for breast cancer in 2008 and the hospital had asked for her to have yearly check-ups following that

could. Her reason for not going home was a lack of money. But the underlying purpose for her being in New Zealand remained the same throughout.

[16] I put to Mrs Browne an example. That is, if the Ministry had agreed to fund an elector but was slow in providing the money for the return trip, and as a result the elector could not return to the constituency, would that mean that the person fell outside the exception in s 7(6)(a)(ii)? Mrs Browne accepted that in such a case it could not be reasonably said that the purpose of the elector had changed but she argued that it was not relevant to the actual instance faced by this Court. For myself, however, I think there is some relevant similarity. Mrs Tumarama was ready to return to Mangaia but was not able to do so because she could not afford the return trip. She had no other reason to remain. I accept that there may be cases where it is difficult to draw a bright line about this sort of situation. It is a matter of fact and degree in each case, and in my assessment Mrs Tumarama does fall within the exception given in s 7(6)(a)(ii). Therefore, I believe that her vote should count and I do not accept the argument in the Petition to the contrary.

The facts: Mr Ngauora

[17] I now address Mr Ngauora. Mr Ngauora did not give evidence before me. The evidence is that he is in Rarotonga undertaking further medical treatment in relation to the same problems that arose in 2010. I accept that Mr Ngauora left Mangaia for Rarotonga on a self-referral basis. I think there is no doubt that he went for the purpose of receiving medical treatment in relation to urinary and prostate problems. This is clear from the records of both the Mangaian and Rarotongan Hospitals. Mr Ngauora had an operation in Rarotonga in relation to his prostate on 29 June 2010. It seems he made a reasonably good recovery. By 9 July 2010 the medical records show that he was fit to fly back to Mangaia when he was ready to do so. It was suggested that he could be seen by the resident doctor on Mangaia. Mr Ngauora did not return to Mangaia at that time. Mr Lynch emphasised the extract from the medical records of 9 July say Mr Ngauora could return to Mangaia *"when he is ready"*.

[18] There was evidence before the Court by way of an affidavit from Mr Ngauora's feeding son. I can give limited weight only to that affidavit because the deponent was not made available for cross-examination. The affidavit referred to Mr Ngauora remaining in Rarotonga until October for convalescence and further medical appointments. The medical records show that from July onwards there was a period when Mr Ngauora's health appeared to be stable but, within a short while, further medical treatment in relation to his urinary and prostate problems was mentioned. For example, on 23 September 2010 it was said that he could not pass urine as well as before, and on 28 September the pain in his private parts was mentioned in the notes. It was clear that he was having continued medical treatment in relation to the matter that had taken him to Rarotonga in the first place. However, by 29 October 2010 it seems he was well enough to travel and he returned to Mangaia. It now appears he has fallen ill again with the same problem.

[19] As far as I can tell from the records (and other evidence), Mr Ngauora had the purpose of coming to Rarotonga for medical treatment and thereafter he retained that purpose until he returned on 29 October. Therefore, I find that he falls within the exception in s 7(6)(a)(ii), and I dismiss the Petition in relation to him.

[20] Because I have dismissed both challenges raised in the Petition, the Petition is now dismissed.

An alternative argument

[21] Mr Matysik raised a further argument by reference to s 7(6)(c) of the Act, submitting that reliance might be placed on such a provision in the case of someone who had originally had the intention of receiving medical treatment and had then finished that medical treatment but nevertheless remained outside the constituency. He argued that such a further period of absence might then fall within s 7(6)(c).

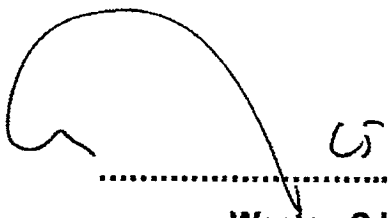
[22] I think there is some merit in that argument but as a result of the findings that I have already made, I do not need to make a final ruling in relation to the argument and I do not do so.

Counter-Petition

[23] Following delivery of this decision I inquired of Mr Lynch whether he wished to proceed and call evidence in relation to the counter-Petition. He said he did not, as a result of the findings that I have made. He withdrew the counter-Petition.

Costs

[24] Costs are reserved.



Weston CJ