ILIESA DUVULOCO & OTHERS

v

ATTORNEY GENERAL OF FIJI & ANOTHER

[HIGH COURT 1994 (Fatiaki J), 27 January]

Civil Jurisdiction

Constitution-elections-amount of deposit and extent of required support-evidence of registration on VKB-certificate from Council of Rotuma-whether discriminatory-whether unconstitutional-Constitution (1990) Sections 16, 41 & 42 - Electoral Decree 1991 Section 3-Electoral (Conduct of Elections) Regulations 1992 Regns 15(11), 15 (12); 1994 Regulations Regn 15A.

The Applicants contended that the requirement for a $500 deposit, in the alternative for a petition of demonstrated support containing the required number of signatures, was unconstitutional. The applicants also contended that the requirement for evidence of registration on the Vola ni Kawa Bula in the case of Fijians and the requirement for a certificate by the Council of Rotuma in the case of Rotumans were both discriminatory and unconstitutional. The High Court HELD: Regulation 15 (12) was unconstitutional.

Cases cited:

Sakeasi Butadroka v AG & Electoral Commission
(Civil Action 214 of 1992)
Clark (C&J) Ltd v IRC (1973) 1 WLR 905

Originating summons in the High Court.

T. Fa for the 1st, 2nd and 4th Plaintiffs
Third Plaintiff In Person
I. Mataitoga (Solicitor General) with *W. Rigamoto* for the 1st Defendant
J. Apted for the Electoral Commission.

Fatiaki J:

On the 30th of April 1992 in Civil Action No. 214 of 1992 Sakeasi Butadroka v AG and Electoral Commission this Court held in the penultimate paragraph of its ruling at p.3:

> "that Regulation 15(10) of the Electoral (Conduct of Elections) Regulations 1992 in so far as it seeks to impose a deposit of $1,000 on candidates contesting the election is unconstitutional and to that extent cannot stand is accordingly declared to be void."

In so ruling this Court expressed the view:

> "that restrictions on candidacy for elective office impairs and hinders the right of voters of their choice and the right of persons to associate in the expression of views in a political campaign."

Subsequently on the 31st of July 1992 in delivering fuller reasons for its earlier ruling (op.cit) this Court said at p.5:

> "....the Court accepts that some regulation is envisaged in the legislative scheme of enactments and is necessary in the holding of orderly parliamentary elections, particularly, in regard to the number of candidates standing for election."

The Court also recognised that:

> "Many legitimate reasons may be advanced in support of such a restriction including, limiting the size of the ballot; reducing the potential for voter confusion; ensuring that the candidate who eventually wins is the choice of the majority of the popular vote; meeting the costs of the election and maintaining the integrity of the electoral process."

I say at the outset no submissions were advanced by the plaintiffs in this action which would undermine or cause this Court to detract from those earlier expressed views.

The effect of the Court's ruling on that occasion was literally to give the candidates of this country a free election.

Since then and barely 18 months later the country is required to undergo another general election and in preparation for it, the Electoral Commission enacted inter alia a new Regulation 15A of the Electoral (Conduct of Elections) (Amendment) Regulations 1994 which reads:

> "15A - (1) No nomination shall be valid unless at the time it is delivered to the returning officer, the nomination paper is accompanied by either,-
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> (a) the sum of $500 in legal tender or a banker's cheque; or
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> (b) a certificate from the Supervisor that the candidate named in the nomination paper has delivered to him a petition of demonstrated support in accordance with this regulation."

and sub-regulation 15A(3)(b) provides that a petition of demonstrated support shall contain the signatures of not less than:

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> "(i) 10 percent of the number of valid ballot papers counted in the last preceding election in the constituency in which the candidate proposes to stand or 500, whichever is the lesser; or
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> ii) in the case of a constituency for which no poll has previously been held, such number of signatures as the Electoral Commission may by notice in Gazette prescribe."

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It will be immediately obvious that the effect of the above new Regulation was to reintroduce a nomination fee albeit for a lesser sum than that which was earlier struck down in Civil Action 214 of 1992 and an alternative means of qualifying for nomination as a candidate for the forthcoming general elections i.e. by way of a petition of demonstrated support.

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The plaintiffs in the first prayer of their originating summons contend without specific reference to any provisions of the Constitution that Regulation 15A (above) is unconstitutional in that the requirements imposed by the Regulation are a hinderance to the fundamental rights of voters and candidates to associate for the protection of their common interests.

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The plaintiffs however do not go so far as to suggest that any nomination fee or any required number of signatures in a petition of demonstrated support would be unconstitutional per se. Nor has it been suggested that Regulation 15A is beyond the powers of the Electoral Commission to make.

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Indeed it was distinctly conceded by the plaintiffs that Regulation 15A was intra vires. Their complaint however was confined to the amount of the fee and the number of signatures required.

Various arguments are advanced by the plaintiffs including that the amount represents "more than 10% of the average annual income of most Fiji citizens" (See: para 7 of the affidavit of the 3rd plaintiff) and "...is unreasonable to rural and village dwellers where the income, if any, is naturally low" (see: the affidavit of the 4th plaintiff)

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The defendants on the other hand point to the various factors and evidence which was taken into account in arriving at both the amount of the nomination fee and the number of signatures required in a petition of demonstrated support for each constituency. These included, written submissions from political parties and interested members of the public; relevant economic statistics compiled by the Director of Economic Planning; past experience with a nomination fee and with a requirement for signatures on a nomination paper; and relevant statistics showing the total number of registered voters and poll

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numbers for each constituency compiled from the last general election in April 1992.

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I have carefully considered the competing submissions and am mindful of the limitations of the economic statistics considered by the Electoral Commission. I have also noted the over-riding consensus in the written submissions received by the Electoral Commission from political parties and individuals favouring the imposition of a nomination fee ranging from $50 to $1000!

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It is abundantly clear to this Court that on the question of what is or is not a reasonable amount for a nomination fee or what is or is not a reasonable number of signatures for a petition of demonstrated support, people will inevitably differ.

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Equally no matter what the qualification criteria adopted for the nomination of an aspiring candidate, its impact or effect on candidates will also inevitably differ, some will find the cash deposit more onerous than the alternative petition procedure, others will prefer the latter and still others may prefer neither and advance a totally different criterion such as was advanced by the 3rd plaintiff in his oral submissions to the Court.

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The plaintiffs themselves appear to concede however that a deposit of $100 and nomination by 50 registered voters would be reasonable and acceptable. One is tempted to ask why not $50 and 25 voters or $200 and 100 voters?

But before Regulation 15A can be rendered unconstitutional much more than ideological differences or personal difficulties needs to be shown by the plaintiffs who bear the burden of demonstrating its unconstitutionality.

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In this latter regard it needs to be emphasized that the right to associate without hinderance is not an absolute right and may, in the interests of public order or for protecting the rights or freedoms of other persons, be curtailed provided such curtailment is reasonably justifiable in a democratic society.

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Furthermore the law is clear that in seeking to impugn a regulation which is accepted as intra vires the opponents of the regulation would need to clearly demonstrate that no reasonable regulation-making body would make such a regulation or that the regulation was so unreasonable in its requirements that the regulation-making body must be taken to have abused its power. Needless to say to prove such a case would require something quite overwhelming.

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As for the number of signatures required in a petition of demonstrated support, the plaintiffs firstly argue that it "...is a violation of their constitutional right to a secret ballot" (See: para 9 of the affidavit of the 3rd plaintiff) and in any event, is unreasonable and cumbersome having regard to the geographical spread of many of the larger provincial and island constituencies. (See: para 8(c) of the supplementary affidavit of the 4th plaintiff)

I confess that I have found it a little difficult to understand the nature and basis of this first ground of complaint. In the first place, unlike the existing requirement where the nomination paper which is publicly displayed included on its face the names and addresses of the 20 voters nominating or proposing the candidature, the certificate of the Supervisor of Elections under the new alternative petition procedure does not require nor necessitate public disclosure of the signatories to the petition and, more importantly, sub-paragraph (5) of Regulation 15A and the prescribed form of the petition itself clearly and expressly provides:

> "(5) For the avoidance of doubt, no person who signs a petition of demonstrated support .....shall be obliged to cast his vote at the election in favour of the candidate to whom the petition relates."

As for the reasonableness or otherwise of the required number of signatures on a petition of demonstrated support not only does this alternative procedure provide a non-cash alternative for indigent persons seeking to stand as candidates in the general election but also, in my view such a measure provides some preliminary showing of a not insignificant modicum of support for the candidature of the person nominated in that constituency.

In my view the plaintiffs have failed on every ground to sustain their claim that Regulation 15A of the Electoral (Conduct of Elections)(Amendment) Regulations 1994 is unconstitutional and I accordingly refuse the first prayer sought in their summons.

I turn next to the second declaration sought by the plaintiffs:

> "that the requirement by the Electoral Commission that all Fijian candidates provide evidence of registration in the Vola Ni Kawa Bula (VKB) and Rotuman Candidates, a letter from the Rotuman Island Council regarding their Rotuman ancestry, is unconstitutional, breaches the fundamental rights and (is) discriminatory on the grounds of race and further such requirement is not reasonably justifiable in a democratic society."

The electoral regulations which provide for such a requirement are specifically, Regulations 15(11) and 15(12) of the Electoral (Conduct of Elections) Regulations 1992 which although in existence during the last general elections were not challenged.

Regulation 15(11) provides:

> "No nomination of a candidate for a Fijian provincial constituency or a Fijian urban constituency shall be valid unless accompanied by a certificate from the Native Lands Commission certifying

> that the person nominated is registered or eligible to be registered in the Vola-Ni-Kawa-Bula and specifying the tokatoka, mataqali, yavusa and yasana in respect of which the person is registered." A

and Regulation 15(12) provides:

> "No nomination of a candidate for the Rotuman constituency shall be valid unless accompanied by a certificate from the Council of Rotuma certifying that the person nominated is of Rotuman descent through his male progenitors or female progenitors." B

and in respect of both certificates Regulation 15(13) provides that they shall be:

> "...treated for the purposes of these Regulations as conclusive evidence of the qualification of the person to whom it relates as a Fijian or Rotuman..." C

I propose to deal with each of Regulations separately. In regard to Regulation 15(11), the affidavit of the Chairman of the Electoral Commission Mr. Q. Bale sets out its *raison d'etre* to be:

> ".....in order to carry into effect the provisions of Section 42(3) and (4) and 156(a) of the Constitution." D

The affidavit also clearly sets out the reasoning and reasons why the Electoral Commission considered that the certification process (if I may call it that) should occur at the nomination stage of the electoral process as opposed to the earlier registration of voters stage. E

It is convenient at this stage to briefly examine the parliamentary electoral system devised and envisaged by the framers of the Constitution.

The Constitution provides for a House of 70 elected representatives of which 37 members are elected from a roll of voters who are Fijians; 27 from a roll of voters who are Indians; 1 member from a roll of voters who are Rotumans and 5 from among persons who are not registered on the roll of the 3 above ethnic groupings. (Section 41). F

Furthermore in relation to the Fijian members of the House of Representatives, Section 48(2) divides the Fijian electorate into provincial constituencies numbering 14 from which 32 members are elected and 5 urban constituencies accounting for the remainder. These mutually exclusive divisions of the Fijian electorate extends not only to Fijian candidates but also to Fijian voters albeit that such voters are registered on a single roll. [See: Sections 42(4) and 50(3)] G

In this latter regard Section 41(2) of the Constitution provides for 4 separate and distinct rolls of voters as follows:

"(a) a roll of voters who are Fijians;

A (b) a roll of voters who are Indians;

(c) a roll of voters who are Rotumans; and

(d) a roll of voters who are neither Fijians, Indians nor Rotumans."

B From the above there can be no doubting that "ethnicity" or "race" is and was a pervasive and predominant factor in the minds of the framers of the Constitution when they came to consider the parliamentary electoral system.

In particular, Section 42(3) which occurs under the heading "Disqualification for election as a member" expressly provides:

C "No person shall be qualified to stand for election as a member of the House of Representatives referred to in Section 41(3) (i.e. the 37 Fijian members). Unless his name is registered or eligible to be registered in the Vola Ni Kawa Bula:

D Provided that a person's registration or eligibility for registration in the Vola Ni Kawa Bula shall be confirmed or determined .... by the Native Lands Commission whose confirmation or decision shall be final and conclusive."

and in respect of Fijian candidates seeking election in a provincial constituency, Section 42(4) requires such a candidate to be registered or eligible to be registered in the Vola Ni Kawa Bula of the Province in which he seeks to E contest the election.

These are undoubtedly constitutional requirements or qualifications for Fijian candidates which the Electoral Commission cannot ignore in the exercise of its regulation-making powers under Section 3 of the Electoral Decree 1991 wherein it is charged generally with the responsibility for making regulations F for the purpose of carrying into effect the provisions of the Constitution regarding elections, and, with particular reference to:

"(a) the registration of voters;
(c) the nomination of candidates; and
(l) forms and fees and charges."

G The plaintiffs complaint however is not one of *ultra vires*, but that the Regulation are in breach a candidate's fundamental rights, in particular, the right to associate freely without hindrance and to be protected from discrimination on the grounds of race. Nothing has been said about how or in what way (if any) the regulation is discriminatory nor has any effort been made to analyze the relevant sections of the Constitution.

In this latter regard Section 16 of the Constitution provides (so far as relevant for our present purposes):

"16.-(1) Subject to the provisions of this Constitution -

(a) no law shall make any provision that in discriminatory either of itself or in its effect;

(2) In this section the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective description by race, ...place of origin ....whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject....

(3) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1)(a) .....to the extent that the law in question makes provision -

(e) whereby persons of any such description as is mentioned in the foregoing subsection may be subjected to any disability or restriction .... having regard to its nature and to special circumstances pertaining to those persons ....., is reasonably justifiable in a democratic society."

In dealing with this ground of complaint I have been greatly assisted by the clear and careful written and oral submissions of Counsel for the 2nd defendant. He advanced several alternative arguments in support of Regulation 15(11). Firstly, it is argued that Section 16 in its own terms is made subject to the other provisions of the Constitution and is therefore subservient to the requirements of Sections 42(3) and 42(4) which specifically relates to the qualification of Fijian candidates. Secondly, it is argued that in the event that Regulation 15(11) is discriminatory it is nevertheless validated or saved by the exception contained in Section 16(3)(e) in so far as Fijians are said to be in "special circumstances"; Thirdly, and in somewhat similar vein counsel submits that the requirement of an NLC certificate under Regulation 15(11) is not a hindrance of any Fijian candidate's right to associate and even if it were, it is a reasonably justifiable law in the interests of public order.

If I may say so all these argument are well taken and in my view provide a comprehensive and effective answer to the complaints of the plaintiffs in so far as it relates to Regulation 15(11) of the Electoral (Conduct of Elections) Regulations 1992.

In Clark (C & J) Ltd v IRC [1973] 1 WLR 905 Megarry J said of the meaning and effect of a provision that began with the words "subject to" at p.911:

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> "Subject to is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail.
>
> The phrase provides no warranty of universal collision."

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Applied to the present circumstances I am satisfied that the provisions of Section 42(3) and 42(4) may be described as the master subsections and the provisions of Section 16(1) the subject subsection. Is there then a collision between them? Learned Counsel for the 2nd defendant appears to assume that there is and with that assumption I agree.

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Having said that however in my opinion the requirement for certification of Fijian candidates necessitated by the provisions of Regulation 15(11) and graphically described by the 3rd plaintiff as "discrimination of the worst type" is indeed discriminatory within the meaning of the term in Section 16 of the Constitution.

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That is to say the Regulation in so far as it imposes an additional certificate requirement for aspiring Fijian candidates and not for Indian candidates or general candidates thereby subjecting Fijian candidates to a disability or restriction to which Indians and others are not made subject affords unequal treatment to Fijian candidates solely on the grounds of race.

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I am also mindful that the Regulation is the means or method adopted by the Electoral Commission and is not a constitutional provision and therefore cannot be classified as a master subsection, nevertheless, the wording of Sections 42(3) and 42(4) are in my humble view discriminatory both in their terms and most certainly in their effect on aspiring Fijian candidates.

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For instance Section 42(3) is a blanket prohibition specifically directed at any aspiring Fijian candidate disqualifying his candidature "uess his name is registered or eligible to be registered on the Vola Ni Kawa Bula". In similar terms Section 42(4) specifically makes the eligibility of an aspiring Fijian candidate seeking to stand in a provincial constituency. "...dependent on him being registered or on his eligibility to be registered in the Vola Ni Kawa Bula of the Province for which he is a candidate".

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In other words this is not a question of discrimination arising out of an offending Regulation, rather, the discrimination occurs and arises within the very terms of the Constitution's prevailing master subsections.

However if I am incorrect in my reading of the meaning and effect of Section 42(3) and 42(4) of the Constitution then for the reasons so ably advanced by learned counsel for the 2nd defendant, I would hold that Regulation 15(11) is

within exception (3)(e) of Section 16 in that it is a law which makes provision subjecting all aspiring Fijian candidates to a reasonable disability or restriction having regard to the special constitutional provisions pertaining to Fijians seeking to stand for election as members of the House of Representatives.

Furthermore and for the several reasons outlined in the affidavit of the 2nd defendant I am satisfied that the Regulation is a reasonably justifiable electoral measure in a democratic society.

In the result I am firmly of the view that Regulation 15(11) of the Electoral (Conduct of Elections) Regulation 1992 although discriminatory is not unconstitutional.

In so far as there is a challenge to the Regulation on the basis of Section 14 of the Constitution i.e. that it is a hinderance to an aspiring Fijian candidates freedom of association, I am of the firm view having regard to the racially-based electoral system devised by the framers of the Constitution under which rolls, seats, voters, candidates and members of the House of Representatives are exclusively classified or categorised along ethnic lines without any provision for cross-voting or non-racial candidates, that in such an electoral system, the right to associate for political purposes in any event is necessarily restricted or confined to associations with one's own racial grouping.

In those circumstances the fundamental basis governing one's freedom to associate in the political or electoral sphere rests solely upon one's ethnicity to the exclusion of all else. That is to say in the political/electoral context the right to freedom of association which the Constitution protects is a right to associate with one's own kind.

Viewed in that context Regulation 15(11) does not offend against the prohibition contained in Section 14(1) of the Constitution.

I make no comment on counsel's alternative submission based on Section 14(2)(a) preferring to leave it to another occasion to determine.

I turn finally to Regulation 15(12) which counsel for the 2nd defendant seeks to justify on the same grounds as that pertaining to Regulation 15(11).

In this regard however counsel properly concedes that in the case of Rotumans there is no similar provision to Section 42(3) and 42(4) which expressly require confirmation of the ethnic eligibility of a person to stand for election .

In my view in the face of that concession the "Subject to" arguments relative to Section 16 of the Constitution advanced by counsel for the 2nd defendant in relation to Fijian candidates is considerably if not completely dissipated when sought to be applied to aspiring Rotuman candidates.

Reliance is placed however on the provisions of Section 156(b) of the Constitution which provides the following definition of who is a Rotuman for the purposes of the Constitution, namely:

> "(b) a person shall be regarded as a Rotuman if, and shall not be so regarded unless, he is of Rotuman descent, whether through his male progenitors or female progenitors; the eligibility of a person under this subsection shall be determined or confirmed, as the case may be, by the Council of Rotumans;"

This provision it is argued:

> "is a non-self-executing provision in that it does not specify when and how this confirmation and determination is to take place. The Commission it is submitted is empowered under Section 40 and 53 of the Constitution and Section 3 of the Electoral Decree, 1991 to execute the provision in so far as candidature is concerned by providing when and how the Council of Rotuma should determine a candidate's status as a Rotuman."

I confess to some difficulty in understanding the relevance (if any) of the provisions of Section 40 and 53 in determining this issue. Section 40 whilst recognizing that machinery legislation may be prescribed nevertheless makes such regulation subject to the provisions of the Constitution, and Section 53 recognizes the right of a registered voter to vote in such manner as may be prescribed. Neither Section deals with the question of a persons qualification or eligibility to stand as a candidate in an election and only by the greatest straining and stretching of one's imagination could they be said to provide the Electoral Commission with the necessary power to make Regulation 15(12). Very simply they do not.

Needless to say the submission makes no relevant reference to Section 42 or Section 49 of the Constitution which specifically deal with the disqualification of candidates and voters respectively, or to Section 53(3) which specifically requires the Electoral Commission in the exercise of its constitutional functions to act in consultation with the Native Lands Commission (not I might add the Council of Rotuma) where necessary.

Certainly the Electoral Commission itself in enacting the Electoral (Conduct of Elections) Regulations 1992 made no reference to any of the above Sections. The only source of its power to make the regulations specifically referred to is Section 3 of the Electoral Decree 1991.

That section reads (so far as relevant):

> "(3) Subject to the provisions of this Decree, the Electoral Commission may make regulations for the purpose of carrying into effect the provisions of the Constitution and this Decree regarding elections and in particular, and without prejudice to the generality of the foregoing, for any of the following matters:
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> (a) the registration of voters;
> (b) rolls of voters.....;
> (c) the nomination of candidates;
> (d) the holding and conduct of elections;"

It is immediately obvious that whatever regulations the Electoral Commission may see fit to enact in terms of its wide and comprehensive powers granted under the above section, they must not contradict or be inconsistent with the over-riding provisions of the Constitution or the Electoral Decree.

Regulation 15(12) is undoubtedly made pursuant to the specific power conferred on the Electoral Commission by Section 3(c) of the Electoral Decree. Similarly the Electoral (Registration) Regulations 1991 are made pursuant to the powers specifically conferred by Section 3(a) of the Electoral Decree. In particular Regulation 25(2) of the Electoral (Registration) Regulations 1991 makes specific provision for the settlement by the Council of Rotuma of any objection to the inclusion of the name of any person on the Rotuman roll within 10 days of its referral by a registration officer. Furthermore Regulation 18 of the Electoral (Conduct of Elections) Regulations 1992 provides a procedure for objections to be taken and settled in respect of the nomination of candidates.

In this regard the Electoral Decree 1991 also specifically provides in Section 8:

> "(that) ... the declaration of any applicant for registration as a voter on the Rotuman electoral roll that he is of Rotuman descent, if made in the form and witnessed in such manner as the Commission may from time to time prescribe by regulations, shall, in the absence of evidence to the contrary, be accepted as correct, and if such applicants appears otherwise qualified to be registered as a voter, he may be registered on the Rotuman electoral roll."

The Section also provides for objections against the registration of any voter on the Rotuman Electoral Roll and for the referral of such objections to the Council of Rotuma for determination.

Furthermore Regulation 13(1) recognizes that:

> "A person is not eligible to be nominated as a candidate unless the person is a voter."

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and a voter is defined in the Regulations as:

> "any person whose name is registered on an electoral roll, and, in relation to a constituency, means any person whose name is registered on the roll for that constituency."

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From the above it is clear that before a person may be nominated or stand as a candidate in an election he must first be registered as a voter.

I interpose here the undisputed evidence of the 2nd plaintiff who deposed in his affidavit:

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> "2. That I am registered as a Rotuman in the Rotuman Roll and my name appears on page 153, line No. 5 and serial No. 816182."

Inspite of the above counsel for the 2nd defendant submits:

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> "The presence of a person's name on the Rotuman main roll is not conclusive evidence of his status as a Rotuman. Section 8(1) of the Electoral Decree, 1991 provides only the procedure for registration as a voter in so far as evidence of qualification. It does not alter the constitutional requirement for that qualification."

E With all due respect to counsel for the 2nd defendant the submission is misconceived in so far as it seeks to attain absolutes.

Section 156(b) of the Constitution does not empower the making of any Regulation let alone one which is clearly discriminatory in its effect.

F Nor am I persuaded that despite all the various procedural checks provided in the Electoral Decree 1991, the Electoral (Registration) Regulations 1991 and the Electoral (Conduct of Elections) Regulations 1992 for ensuring the ethnic purity of the Rotuman Electoral roll and any candidate seeking to contest for the Rotuman seat, that the roll cannot be relied upon as providing prima facie evidence of a Rotuman candidate's ethnicity.

G Nor for that matter do I accept the submission that Section 156(b) requires a determination at some time at least (whatever that might mean) or that the Electoral Commission can pick and choose as it pleases when a determination by the Council of Rotuma (if ever needs be) should occur.

True Section 156(b) is non-self-executing but that is a completely different thing from saying there exists no provision in the Constitution which would

enable it to be considered and executed to adopt the terminology of counsel.

On the contrary, in my view Section 46 which specifically empowers this Court to hear and determine any question whether any person has been validly elected as a member of the House of Representatives, which, in the case of a Rotuman member, could well include the question of his ethnicity, enables Section 156(b) to be executed. That is the 'time' (if any) designated by the Constitution when the determination or confirmation shall be made by the Council of Rotuma and the Electoral Commission may not of its own accord curtail it much less will this Court as the upholder of the Constitution countenance its pre-emption by means of a discriminatory regulation.

If anything the determination by the Council of Rotuma if it must inevitably occur within the electoral process (as counsel claims) ought in my view to occur at the registration of voters stage. This is because the Constitution establishes and requires "a roll of voters who are Rotumans" and it is from that 'roll' that one member of the House of Representatives is elected. [See: Sections 41(2)(c) and 41(5)]. In other words the Constitution itself recognizes the pre-eminence of the roll of voters.

In my view there is no constitutional mandate for a roll of voters who might be Rotumans subject to confirmation, nor ought the constitutional function exclusively conferred on the Council of Rotuma by Section 156(b) be abrogated in favour of a personal declaration procedure albeit that the latter is contained in a Decree and is more convenient and less expensive than the constitutional alternative.

Then counsel submits that the regulation "falls within the exception set out in Section 16(3)(e). Rotumans no less than Fijians are in special circumstances". No attempt has been made however to elaborate on the "special circumstances" of Rotumans in electoral matters or in any other respect which would bring Regulation 15(12) within the constitutional exception. In any event the argument assumes the validity of the regulation.

In the light of the above it is not necessary to consider the constitutionality of the Regulation vis-a-vis Section 14 of the Constitution which protects the right to freely associate without hindrance.

For the foregoing reasons I would strike down Regulation 15(12) of the Electoral (Conduct of Elections) Regulations 1992 as unconstitutional and I grant the second prayer of the plaintiffs in so far as it relates to Rotuman candidates.

In summary therefore the decision of this Court is as follows:

(1) Regulation 15A of the Electoral (Conduct of Elections) (Amendment) Regulations 1994 is upheld as constitutional;

(2) Regulation 15(11) of the Electoral (Conduct of Election) Regulations 1992 is upheld as constitutional; and

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(3) Regulation 15(12) of the Electoral (Conduct of Elections) Regulations 1992 is quashed as being unconstitutional.

Finally and bearing in mind the importance of the action and the issues of general public interest raised therein I make no award of costs.

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