IN THE HIGH COURT OF NIUE

IN THE MATTER OF:	A PETITION FOR INQUIRY
IN THE MATTER OF:	THE VILLAGE ELECTORAL ROLL OF TOI
AND IN THE MATTER OF:	A PETITION FILED BY A CANDIDATE AND 5 ELECTORS BROUGHT BY MRS MOKAELALINI MAKAOLA HUKUI VAHA
AND IN THE MATTER OF:	THE DISPUTED ELECTION OF DION TAUFITU

Judgment: 15 May 2014, (11 am, New Zealand time)

DECISION OF P J SAVAGE CHIEF JUSTICE OF NIUE

Introduction

[1] General elections for Niue were held on the 12th of April 2014. For the constituency of the Village of Toi there were two candidates: Mr Dion Taufitu on the one hand and Mrs Mokaelalini Vaha on the other. When the election results were counted each candidate had 10 votes. There was a recount which did not alter that result and then pursuant to s70 of the Niue Assembly Act 1966, (the Act), the candidate was determined by lot. Mr Taufitu was successful.

[2] This is an electoral petition filed by Mrs Vaha pursuant to s90 to 98 inclusive of the Act, and seeks an inquiry into the conduct of the election.

[3] Mr Taufitu filed submissions as did Crown Law of Niue. The hearing was conducted by telephone conference on the 7th of May 2014 where the parties gave evidence and made submissions. The hearing lasted 3 hours.

Jurisdiction

[4] It was put to me by Crown Law in written submissions filed before and after the hearing and also by applicant, that this Court did not have jurisdiction and that the

roll, in effect, once closed is beyond the oversight of the Court. This is a startling proposition and when I put it to Ms Hekau that this would mean that an error, even an intentional error, could not be remedied, she suggested that judicial review could still be appropriate. I do not agree with her. The Common Law and the legislation throughout the Commonwealth has always been aimed at producing a streamlined process, so that good government is not delayed.

[5] The submissions appear to have a basis in a judgment of Isaac J, of the 23rd of June 2011.[1] That case is slightly different, but be that as it may, I must respectfully decline to follow it. The difference in that case is that, when the rolls closed there was an objection to registration of an elector. As is required by s18 that objection was determined by the Niue Public Service Commission. The Commission determined the objection and disallowed it pursuant to s21. That section ends with the proposition that *"such determination of the Niue Public Service Commission shall be final."* It appears that Isaac J decided that that precluded him from re-opening the matter on a petition after the election.

[6] The difference between that case and this, is that in this case there was no objection to the roll. In my view that does not matter in a general sense.

[7] It might be thought that decision is not determinative because of the difference. But I am concerned with the interpretation given to the words, final, in s21 and conduct of the election in s19(1). So far as the word final is concerned in terms of administrative law, the question is always asked, when sections such as this are said to oust the jurisdiction of the Court, final for what purpose?

The answer must be that the Commission's determination is final for the purpose of allowing the election to go ahead but can in no way be read as ousting the jurisdiction of the Court in relation to any petition that might be subsequently brought. The jurisdiction is an ancient one and of immense constitutional importance and is not to be taken away by a side wind. The jurisdiction is part of the law of Niue as is referred to in Article 37(2) of the Constitution.

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1 Puletama Tofua v Niue Public Service Commission 3 June 2011

[8] So far as the term, conduct of the election, there was reference in that judgment to the structure of the Act and the fact that Part 4 of the Act was headed "Conduct of the Elections." That was said to support the proposition that the petition could only look at what happened on voting day. That appears to be the ratio of the judgment.

The Acts Interpretation Act 1924, s5(f) makes reads as follows:

> *"The division of any Act into parts, titles, divisions, or subdivisions, and the headings of any such parts, titles, divisions, or subdivisions, shall be deemed for the purpose of reference to by part of the Act, by the headings shall not affect the interpretation of the Act."*

This is the legislation in force in Niue.

The position in New Zealand has been different since 1999.[2] I do not believe that in Niue it was logical or proper to have regard to the headings of the Act.

[9] A literal interpretation of the judgment would mean that bribery, or treating, weeks or months before, or a mismanagement of the roll, whether intentional or not, would be beyond the reach of this Court on an electoral petition. With the greatest respect I must decline to follow this judgment. The proper administration of justice in a democracy requires that this jurisdiction be present. It is deeply rooted in the Common Law and is not to be taken away in an oblique manner. This basic jurisdiction developed in step with the development of democracy itself.[3] There are many many examples where it has been confirmed that the power to declare an election void, was a common law power refined by statute.[4]

[10] There are many many examples of electoral petitions throughout the Commonwealth but a few New Zealand examples will suffice.[5] The last case noted, is relevant particularly because it relates to electors qualifications in relation to residence which is at issue in this case.

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2 Interpretation Act 1999
3 *Morgan v Simpson* [1974] 3 ALL ER 722, 725, per Denning L J
4 *Hunua Election Petition* [1979] 1 NZLR 251
5 *Wellington Central Election Petition, Shand v Comber* [1973] NZLR 470; *Taupo Election Petition* [1982] 2 NZLR 244; *Wairarapa Election Petition* [1988] 2 NZLR 74

[11] Electoral petitions are not uncommon in other Pacific jurisdictions where elections are hotly contested and where electoral rolls are small and one or two votes can make all the difference. A Cook Islands example where the legislation is similar will suffice.[6] In that case there was a specific challenge on the lack of residential qualification to vote. The Court of Appeal said:

> "[91] As Mr Harrison accepted, the failure to lodge an objection against the eligibility of a particular elector, and logically also the lodging of an invalid or null objection, cannot prohibit the Court from carrying out its statutory jurisdiction . If a challenge to the validity of a particular vote is properly mounted under a petition brought pursuant to the Act, then the Court is under an obligation to inquire into and adjudicate on that challenge."

[12] I therefore hold that I have jurisdiction and that the jurisdiction given by s90 and the Common Law is not limited to any particular part of the process but relates to the conduct of the election as a whole. Further, I hold that the failure to file an objection before the election, or, if an objection was filed the result of any determination of that objection, does not preclude the subsequent filing and hearing of a petition to this Court.

[13] If the word "final," as it appears in s21 were to intend that this Court did not have jurisdiction, it would very likely be void as ultra vires the constitution. A recent example of that can be seen in the Cook Islands jurisdiction.[7]

The Petitioner's case

[14] The petitioner's case relates to four voters, all of whom are close members of Mr Dion Taufitu's family. There are two parts to the allegations:

It is first said that Morgan Taufitu and his daughter Millyan were not eligible to participate in the general election. This is an allegation that they were in effect "fly in voters."

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6 *Wigmore v Matapo* [2005] CKCA1; CA 14.2004 (19 August 2005)
7 *Puna v Woonton Anors* [2004] KC CA 4

The second allegation is that Tania Taufitu Hopokigi and her husband Heston are not resident within the Village of Toi and therefore not eligible to vote in the Toi electorate.

I should make it clear that I do not know and should not know how any of these voters in fact voted, but if they have improperly voted it would clearly affect the result of the election in this constituency.

The allegations against Morgan and Millyan

[15] It is alleged in the petition that these two, (father and daughter), travelled from their place of residence in New Zealand on Friday 11th April 2014, (the day before the election), to Niue, for the purpose of voting in the general elections and specifically for the election of the Member of the Assembly for the Constituency of Toi. It is a fact that they flew in to Niue on Friday the 11th of April 2014.

[16] The matter turns on s12 and by logical reference to Article 17 of the Constitution. There is no relevant difference between them for the purposes of this inquiry.

Section 12 provides:

> **"12 Qualifications of electors**
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> (1) Subject to this Act, a person shall be qualified to be registered as an elector of any constituency if that person –
>
> (a) Is either –
>
> (i) a New Zealand citizen; or
> (ii) a permanent resident of Niue as defined by the Entry Residence and Departure Act 1985; and
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> (b) Has at some period resided continuously in Niue for not less than 3 years; and
>
> (c) Has been ordinarily resident in Niue throughout the period of 12 months immediately preceding application for enrolment as an elector or, as the case may be, nomination as a candidate;
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> (d) He is of or over the age of 18 years; and
>
> (e) He has not been convicted in Niue or in any other part of the Commonwealth of any offence punishable by death or by imprisonment for a term of one year or upwards, or has been convinced in Niue of a corrupt practice, unless in each case he has

received a free pardon or has undergone the sentence or punishment to which he was adjudged for the offence; and

(f) He is not of unsound mind; and

(g) He is a resident of that constituency.

(2) For the purpose of this section a person shall be deemed to be ordinarily resident in Niue if, and only if –

(a) He is actually residing in Niue; or

(b) Having been actually resident in Niue with the intention of residing there indefinitely, he is outside Niue but has, and has ever since he left Niue an intention to return and reside there indefinitely.

(3) Any person who has been outside Niue continuously for any period of more than 3 years, otherwise than for the purpose of undergoing a course of education or of technical training or instruction during the whole or substantially the whole of that period, shall be deemed not to have been actually resident in Niue during that period with the intention of residing there indefinitely."

[17] Both Morgan and his daughter Millyan fulfil the requirements of ss1(a) to (f). In the context of this case I have to decide whether Morgan and Millyan are residents of the constituency of Toi, s12(1)(g). I should remark that when both were enrolled as electors some years ago they fulfilled the requirement of s12(1)(c). The question is whether they have lost the qualification to be registered because of their absence from Niue. I therefore have to ask myself whether they have been actually residing in Niue, s12(2)(a).

[18] Morgan is 46 years old. He was born in Niue. He has been a registered voter since 1990. He spent some time in the University of the South Pacific in the early 2000s travelling to what he described as home (Niue), three times between February 2002 and February 2003. In his submission he refers to himself being resident in New Zealand from 2004. He has returned home on the following dates:

- 2nd to 21st December 2005;
- 12th to 22nd September 2006;
- 6th to 13th June 2008, (he arrived the day before the general election);
- 6th to 13th May 2011, (he arrived one day before the general election);
- 30th March to 6th April 2012;
- 11 April 2014 (still in Niue, arrived the day before the general election).

[19] The facts are not really an issue here. He has never been continuously outside Niue for more than 3 years, s12(3). He is clearly not actually residing in Niue, s12(2)(a).

[20] I must therefore turn to s12(2)(b), I accept his evidence that he grew up in the Village of Toi and always intended to reside there indefinitely. He told me, and I have no reason to doubt this and no evidence to the contrary, that when he was in Vanuatu studying he intended to return to Niue and live there permanently. So far as his time in New Zealand is concerned he says that the plan in his family was for him to come to New Zealand and find suitable accommodation for Millyan so that she could attend quality education, but this was a temporary thing and that he would return to Niue when that education was complete.

He secured a rented property in South Auckland in 2006. In 2007 his daughter joined him and enrolled in Rutherford College in 2008. Her final college year was 2011 and she is engaged in tertiary study commencing in 2012. This is his daughter's final year and he tells me that when she finishes they will return to Niue indefinitely.

[21] When in Niue he has always lived at Dion Taufitu's home and he has a number of possessions in Niue including a car. He has been an active person in both general elections and village council elections.

[22] That being the case I must hold that he fulfils the requirements of s12(2)(b), and was qualified to vote in the recent elections.

[23] Millyan has the same intention to return to Niue. She has clearly not been absent continuously for 3 years. She is a 21 year old. She left Niue in July 2007 and has returned to Niue no less than 11 times, including the arrival on 2 May 2014. She told me she intends to return home with her dad (Morgan), and that has always been her intention. She therefore fulfils the requirements of s12(2)(a) and has not been outside Niue for more than 3 years and even if she had been outside Niue for 3 years, I am satisfied that that was for the purpose of education for substantially the whole of that period.

Millyan Taufitu was entitled to vote in the general elections for 12 April 2014.

The allegations against Tania and Heston Hopokigi

[24] The allegation here is that this couple (husband and wife), do not live at Toi, but live with Heston's family at Avatele. I heard from the petitioner and four of the five electors who signed the petition as is required by the Act. They are all residents of Toi. The general thrust of their evidence was that they do not see Tania and Heston in the village very much. They don't see Tania's car parked there except when she is visiting. They live some hundreds of yards from Dion's home, where Tania and Heston say that they live, and say that they would see that car if it was there, but this was slightly unsatisfactory in that there is a car park at the back of the house where a car might be difficult to see. They point to the fact that Heston plays cricket for a team on the southern side of the Island, rather than the team associated with Toi which is on the northern side of the Island. They also point to the fact that Heston is a machine operator employed on the southern side of the Island.

[25] The point made by them is that Heston and Tania do not normally reside at Toi. The allegation is that they are "drive in" voters. Section 13(2) makes it clear that the roll is to contain only the people who are resident in the constituency.

[26] The place of residence is defined by s15:

> "A person shall be deemed to reside where he has his usual place of abode at any material time or during any material period, notwithstanding his occasional absence from it, and notwithstanding his occasional absence on leave from his occupation or employment."

[27] Tania and Heston are 27 and 26 years of age respectively. Heston is from Avatele. He married Tania on the 17th of December 2011 and subsequently applied to transfer from the Avatele roll to the Toi roll in time for a by-election in 2012. Tania is from Toi and this couple say that they live with her parents. Both are adamant that they are residents of Toi and do not live in Avatele. I questioned them both about the usual matters that indicate a place of abode. They can be matters as mundane as where you keep your toothbrush or night attire, or where you usually sleep. In each case their answers indicated residence at Toi. Tania is a nurse and she explains the fact that she is not seen in the village particularly in the morning, in terms of having to go to work earlier than those who claim that she is not a resident of Toi. Heston told me that he has not slept at his mother's house since his marriage except when he was

waiting for his wife to come off shift from the hospital. A number of residents of Toi confirmed that Tania and Heston live at Toi. They have been absent from Niue for a period while they were in Australia, but that does not impinge on their status for the purpose of this case.

Particularly important was the evidence of Mrs Moka Tongakilo who is the minister in charge of the Toi Ekalesia church at Toi. She confirmed that Tania and Heston were resident at Toi and active members of her church.

[28] On balance the evidence presented to me establishes that Tania and Heston had their usual place of abode at all material times at Toi. They were entitled to be upon the roll for Toi and to vote.

Result

[29] I determine that there is no irregularity that affected the result of the election. The election in relation to the constituency of Toi, is not void in that regard and Dion Taufitu was duly elected.

[30] That is my determination pursuant to s95. I direct that the Deputy Registrar of the High Court of Niue, Mr Darren Tohovaka transmit this determination to the Clerk of the Assembly, so that that person can complete his duties pursuant to s95(2).

[31] I reserve the question of costs [s97(1)] and any party wishing to make submissions on costs may do so within 14 days. At the expiry of 14 days the matter is to be referred to me again for that purpose. The parties may however feel that justice will be met if no such Order were made.

[32] The grounds of the petition not having been met I decline to order that the deposit paid be returned to the petitioner and it shall be deemed forfeited to Her Majesty and form part of the public revenue of Niue.

Dated at Rotorua, New Zealand this 15th day of May 2014

P J Savage CJ