Afeaki & another v Fuko & another

Supreme Court, Nuku'alofa
Dalgety J
Electoral Petition No. 179/93

10, 11, 12, 13, 14, 15, 17, 18 and 21 May 1993

Constitution - provision of Electoral Act at variance with
Elections - qualification for - candidates
Words & phrases - meanings of permanent & residence

The Petitioners claimed that the two successful candidates for Ha'apai in the 1993 Parliamentary Elections were not entitled to stand and therefore their elections were unlawful.

It was argued that neither Respondent were entitled to be placed on the roll of electors for Ha'apai and therefore could not stand for election.

Held (dismissing the petitions):-

1. There being no Rules relating to election petitions, technical pleading points should not stand in the way of s.35 Electoral Act - "guided by the substantial merits and justice of the case without regard to legal forms or technicalities".
2. The fact that objections can be taken to names claimed to be wrongly included in draft Roll does not preclude a Petition being taken, after Election, based on a claim of non-entitlement to enrollment.
3. To be a valid candidate in a Parliamentary Election the person must be qualified to be an elector.
4. If so qualified then the person can be a candidate in any electoral district.
5. The First Respondent was so qualified because he was resident in Ha'apai, although he could not fit the definition in the Electoral Act, s.4(4) of permanent residence; but that the requirement of permanacy was at variance with Cl.4 of the Constitution, because it would mean effectively that a Representative of an electoral district other than on Tongatapu, would be debarred from re-election (unless they held a tax api within the particular district) and s.4(4) therefore discriminated between the land holding class and non-landholders.
6. The Second Respondent was not even a resident, but he did in fact hold a tax api in Ha'apai.
7. Considerable discussion on the meaning of "resident", "permanent" and the provisions of the Constitution viz a viz the Electoral Act.

Case considered: re Coxon [1948] 2 All ER 492

Fox v Stirk & Bristol [1970] 29B 463
Fuko v Vaikona [1990] Tonga LR 148
Geothermal Energy v CIR [1979] 2 NZLR 32
Henricksen v Grafton [1942] 2 KB 184
Hipperson v Newbury [1985] 1 QB 1060
Jones v Llanrwst 80 LJ Ch.150
Levene v CIR [1928] AC 217
Manakotau v Vaha'i (Hunter J, 31 March 1959)
Oldham Election Petition (1869) 20 L.T. 302
Paasi v Sanft 5/87 (Martin CJ 12 May 1987)
R v Norwood (1867) LR 2 QB 457
Tara Exploration v M.N.R 70 D.T.C.s.370
Thomas v Bensted (1918) 7 TC 137
Tu'i'afitu v Moala (Privy Council 25 Jan. 1957).
re Wairarapa Petition [1988] 2 NZLR 74

Statutes Considered — Constitution Cl 65, 54, 23
Electoral Act 1989, ss.5
Electoral (Amendment) Act 1992, ss.25, 26, 35
Interpretation Act s.35

Counsel for Petitioners : Mr Barron Afeaki
Counsel for Respondents : Mr Edwards

Judgment

This case was brought before the Supreme Court of Tonga as an Election Petition under and in terms of the provisions of the Electoral Act 1989 (cap.22) as amended by the Electoral (Amendment) Act 1992 (Cap.15). Section 25 (1) of the 1989 Act provides that -

> "No election and no declaration of polls shall be questioned except by a petition complaining of an unlawful election or unlawful declaration (in this Act refered to as an election petition) presented in accordance with [Part V] of this Act."

The First and Second Petitioners, Viliami Pousima Afeaki and 'Emosi 'Alatini, have petitioned this Court to find and declare that Sione Teisina Fuko and 'Uliti Uata, respectively the First and Second Respondents, were not entitled to stand as Candidates for the Island electoral district of Ha'apai in the 1993 Parliamentary Elections and, that their success in each being returned as a member of parliament in the election constitutes an "unlawful election" within the meaning of Section 25(1). The Petition itself is not ideally pled, but in my opinion does give adequate notice of the real issue to be tried. The content of the Petition is not prescribed bylaw. Section 26 (3) merely specifies that the petition "shall be in such form and state such matters as are prescribed by Rules of Court . . ." There are as yet not such Rules relating to Election Petitions : perhaps before the 1996 General Election, rules will have been promulgated, as guidance to litigants, thus excluding legal argument based on technical pleading points. I recommend the enactment of such Rules. In any event Section 35 expressly enjoins the Court on the trial of an election petition to be -

> ". . . guided by the substantial merits and justice of the case without regard to legal forms or technicalities . . ."

Accordingly, I refused Mr Edwards' motion to dismiss this Petition in so far as his case was base on deficiencies of pleading on the part of the Petitioners.

Mr Edwards second preliminary plea was that this Court had no jurisdiction to try the present case given that the right to stand as a candidate was conditional upon being enrolled as an elector; that no challenge had been taken timeously to the Respondents enrollment as electors for Ha'apai; and that the Petitioners had not availed themselves of the prescribed Statutory procedure for challenging the enrolment of either Respondent as a Ha'apai elector. Under and in terms of Section 5(1) the Election Supervisor is required to publish a draft electoral roll not less than six months prior to the date when an election must be held. Thereafter a two month period is provided for objections to be lodged as to the content of the draft roll, be it a name "wrongly included" or a name "wrongly omitted" or a name included in "the wrong electoral district" : Section 5(2). The Supervisor is required to consider such objections and if thought fit to revise the draft roll to take account of the objections, subject to the right of any person dissatisfied with his decision to appeal the decision to an administrative body known as the Electoral Appeal committee : Section 5(3). At the end of this process, which is supposed to be completed at least two months prior to the election date, the final election roll is published : Section 5(4). Although final and "conclusive of the electors in each district who are entitled to vote" at the ensuing Parliamentary Election Section 5(5) provides that the final election roll is subject to amendment in one of four circumstances all obvious and very sensible, namely -

(a) to include an elector who becomes qualified to vote between publication of the

final roll and election day; or,

(b) to exclude any elector who dies or becomes disqualified to vote in any election between publication and election day; or,

(c) to take account of any Appeal Committee decision not available when the roll was published ; or,

(d) to correct clerical errors.

Section 5(6) precludes inter alia any objection being made that an elector shown in the final roll "was not entitled to be included in the roll . . . " The Petitioners in this case would certainly have been entitled to avail themselves of these provisions to object to the inclusions of the Respondents as electors for Ha'apai. Had they done so it would have been less obstructive to the electoral process, the aim of which always is that the will of the electorate as reflected in the ballot box should be final except in very exceptional circumstances where the Court is empowered to intervene retrospectively. Nevertheless the provisions of Section 5(7) must not be overlooked for that subsection expressly empowers this Court to hold "that any candidate was not entitled to be a candidate". That is precisely what the Petitioners seek to do in this case. They say that neither Respondent was qualified to stand as a candidate for Ha'apai, and accordingly that their successful candidature constituted an "unlawful election" within the meaning of Section 25(1).

In my opinion therefore the Supreme Court has jurisdiction to entertain the present proceedings. The link between qualification as an elector and as a candidate for election is fundamental for Clause 65 of the Act of Constitution of Tonga (cap.2), hereinafter referred to as "the Constitution" states that -

> "any person who is qualified as an elector may be chosen as a representative (of the people) . . ."

The Petitioners base their challenge to the Respondents' candidature upon their alleged failure to be qualified as electors for Ha'apai. This entitles the Supreme Court to adjusdicate upon the substance of the Petitioners' complaint. Although decided upon a different factual basis, namely whether or not a Tongan by birth but a foreigner by naturalisation was entitled to be a candidate in Tonga at a Central Election, Martin CJ in Paasi -v- Sanft and Others, decided on 12th May 1987, very properly remarked that -

> "Clause 65 of the Constitution permits only a properly qualified candidate to be elected. If for whatever reason a person who is not properly qualified is elected that election is of no effect. It is not in accordance with the Constitution. The Court does not have a discretion whether or not to set aside his election. If he was not properly qualified for whatever reason the Court must declare his election void".

On Appeal, on 3rd August 1987, the Privy Council expressly approved of this approach, notwithstanding the then existing procedure for challenging the content of the draft elector roll - a procedure in essence not dissimilar to the provisions of Section 3 of the 1989 Act. The Privy Council took the approach that -

> "We are concerned with Siale's election to the (Legislative) Assembly rather than his right to vote and we cannot accept that the law is powerless if a disqualified person is so elected. Apart from anything else his presence as a member in the Assembly is contrary to Article 65 of the Constitution".

The decision of the trial judge, endorsed by the Privy Council, in the case of Siale was to effect -

(ONE) : that he was not qualified as an elector, and was not therefore

qualified to be elected a representative of the people; and

(TWO) : that his election was void; and,

(THREE) : that the Chief Returning Officer for the Kingdom of Tonga be ordered forthwith to remove Siale's name from the register of electors.

The Petitioners do not seek an Order akin to (THREE) and would be content if I were to pronounce an Order along the lines of (ONE) and (TWO) and report my decision to the Speaker of the Fale Alea. Accordingly I do not require to consider whether an Order along the lines of (THREE) is still competent given the subsequent enactment of the 1989 Act.

As to Clause 65 of the Constitution it is noteworthy that the Court of Appeal on 3rd September 1990 in the case of Sione Teisina Fuko (the present First Respondent) -v- Sione Tu'ifua Vaikona [1990] Tonga LR 148 were of the view that -

"There is no ambiguity in the wording of the Clause, no obscurity and simply no room for holding that the Clause does not mean exactly what it says in clear terms . . ." (p.150).

In the present context I endorse and adopt that approach. In Tonga one cannot validly be a candidate in a Parliamentary Election unless one is "qualified to be an elector"

Clause 54 of the Constitution read together with Clause 23 thereof provides that a person of the male sex (this case is not concerned with females) qualifies as an elector for representative of the people if he is -

(a) a Tongan subject; and,

(b) over the age of 21 years; and,

(c) a commoner and not a Noble; and,

(d) a taxpayer; and,

(e) literate, namely able to read and write; and,

(f) of sound mind, that is neither insane nor an imbecile; provided always that he is not,

(g) a convicted criminal in respect of an offence punishable by imprisonment for more than two years ; or

(h) the holder of what can best be described as an office of profit under the Crown.

In this case I am satisfied as a matter of fact that both Mr Fuko and Mr Uata satisfy each and every one of requirements (a) to (f) and that neither of them are debarred by reason of either requirement (g) or (h). Mr Edwards submitted that I need look no further in arriving at my decision. Mr Afeaki, not unnaturally, relied upon the terms of the 1989 Act.

The complicating factor which gave rise to the present Petition is the terms of the 1989 Act. Section 4(3) requires every adult Tongan to apply for registration as an elector "on the roll for the district in which he is then residing "and requires an elector who changes his residence to re-register in this district to which he has removed and de-register in the district where formerly he resided. Citizens do not have a choice as to whether or not they register. It is mandatory so to do. Failure to comply with the provisions of the subsection is a criminal offence : Section 4(8). This case is not concerned with the constitutionality of compulsory registration, which is perhaps surprising as just about every other legal argument or device available to Counsel has featured in this case. Section 4(4) goes on to enact that a male person is deemed to be a resident of the electoral district -

(a) . . . in which the tax allotment (api tukuhau) of which he is the holder is situated"; and, in the event of his not holding a tax api anywhere in Tonga then, of the district

"(c) . . . in which (he) permanently reside . . ."

As a matter of administrative convenience the Kingdom of Tonga is divided into several geographical electoral districts of which Ha'apai is one and Tongatapu another. Mr. Edwards argues that under Clause 65 of the Constitution, whatever may be the rules relative to registration as an elector, an elector once qualified as such by inclusion in the electoral roll was entitled to stand for election as a representative of the people and to be elected to Parliament in that capacity, in any elector district, and was not restricted to the district in which he was registered as an elector. That is the plain meaning of what the Constitution states : it does not make registration as an elector in any particular district a condition precedent for candidature in that district. Thus a registered elector in Tongatapu could, he argues, lawfully stand as a candidate in any other electoral division of the Kingdom such as Ha'apai or Vava'u. This submission I consider to be well founded. There is in fact no express requirement in the 1989 Act restricting candidature to the district in which one is qualified as an elector. If there had been, such a provision would have been open to challenge as inconsistent with the Constitution and, to that extent, of no legislative effect being ultra vires : see also Section 35 of the Interpretation Act (cap. 1). Section 9(1) of the 1989 Act merely directs a returning officer to "receive the nomination of any duly qualified candidate or candidates for the seat . . . to be filled:. And a candidate is "duly qualified" for this purpose if he is a registered elector in any district and provided that his nomination paper is in proper form as required by Section 9(2) and the necessary deposit stipulated in Section 9(3) has been paid. In this case there was never any suggestion that either Respondent did not pay the necessary deposit nor that their nomination papers were other than in proper form.

Nevertheles, the question still remains whether either Respondent was "qualified as an elector". Both have effected registration in Ha'apai only. I now turn to examine their entitlement to such Registration. In the case of the First Respondent, it was a matter of admission that he has no Api Tukuhau anywhere in Tonga. Was he therefore a permanent resident of Ha'apai, for his entitlement to be on the Ha'apai Register, according to the Petitioners, depends on the answer to that question. If the answer thereto is in the affirmative then his election is lawful and the Petition insofar as directed against him would require to be dismissed. On the other hand if the question is answered in the negative his election is void. It is his entitlement to register as a Ha'apai elector for the 1993 election which requires to be considered at this Hearing. In other words, was he permanently resident in Ha'apai during 1992 and the five weeks of 1993 immediately preceding the February 1993 General Election? The evidence was clear that at the material time the First Respondent maintained two homes, one in Ma'ufanga and the other at Ha'ano, Ha'apai; that he had business interests in both Tongatapu and Ha'apai; that because of his Parliamentary duties he spent about eight months of the year in Tongatapu and only about four months of the year in Ha'apai; that Parliament sat only for about five months of the year but that necessary duties as a parliamentarian required the First Respondents' presence in Nuku'alofa and elsewhere within Tonga and abroad when Parliament was in recess; that as a matter of practical convenience, and to provide for the vagaries of the postal service, he used his Ma'ufanga address for official purposes; that his wife resided at Nuku'alofa where she was in full-time employment with the Inland

Revenue; that his children attended full-time schooling at Nuku'alofa; and that he paid tax at Nuku'alofa. On the other hand it was also established in evidence to my satisfaction that the First Respondent was born at Ha'ano, Ha'apai; that both his parents emanated from the village of his birth; that his family's land is situated at Ha'ano; that his mother continues to reside there and that on her death the family are agreeable to applying to the Estate Holder to sub-divide the family lands and provide a holding for Mr Fuko centred on that part of the family lands where he has built a house; that his committment to Ha'apai is deep and genuine; that he gave up well paid employment in Vava'u to go and reside in Ha'apai with his family in the aftermath of Hurricane Isaac in 1982 in order that he might be of service to the people of Ha'apai; that his committment to Ha'apai led to his seeking election to Parliament to represent Ha'apai and he was duly elected to Parliament in 1984 and has been re-elected at every election thereafter; that he cultivates the land he is in possession of at Ha'ano with assistance from others when he is absent; that he is a member there of the congregation of the Methodist Church and it is to that congregation that he make his MISINALE. Nor was there any challenge to the generous compliment from the First Petitioner, Viliami Afeaki, that Mr Fuko was a very good Member of Parliament for Ha'apai. Parliament is based in Nuku'alofa and Mr Fuko is compelled to spend many months of the year there in the furtherance of his Parliamentary duties. Not unnaturally he prefers to have his wife and family with him there in order to enjoy as normal a family life as it is possible for a politican to have. But for his election to Parliament I am satisfied that Mr Fuko would reside in Ha'apai permanently.

The qualification for registration as an elector is neither "residence" nor "ordinary residence" but "permanent residence", a term I have never come across before as a condition for registration as an elector. The intention of Parliament requires to be gathered from the terms of the Statute itself. The concept of "permanent residence" is a novelty introduced by the 1989 Act. I require to assume that Parliament deliberately intended to impose a test of "permanent residence". Under the pre-1989 rules to be found in Section 5(t) of the Legislative Assembly Act (cap.14), now repealed by Section 4 of the Legislative Assembly (Amendment) Act 1989 (cap.23), the qualification for registration as an elector was based on deemed residence, either the district in which one's tax api was situate, failing which "the district where his poll tax is payable". The now repealed Poll Tax Act 1949 required every adult male Tongans to pay a poll tax, in the event that he had no tax api, in the district directed by the tax clerk, which was invariably the district of his principal residence. The Act laid down no hard and fast rules, but preferred to rely on the decision of the tax clerk in whom the power was vested to decide the district of payment. This is altogether a different scheme from the provisions introduced in the 1989 Act. Lord Chancellor Cave in Levene -v- Commissioners of Inland Revenue [1928] A.C 217 (House of Lords) considered that the dictionary definition of "reside" as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place" was an accurate indication of the meaning of the word reside, and appeared to regard the terms "resident" and "ordinarily resident" as virtually synonymous. The Court of Appeal in Fox -v- Stirk and Bristol Electoral Registration Officer [1970] 2 Q.B. 463 allowed students to register as electors for their University cities even although they resided elsewhere (at home) when University was on vacation, which it is in the United Kingdom for about five months each year. The test for registration under the United Kingdom legislation was mere "residence". Lord Denning (page 475) considered

a person may properly be said to be resident in a place "when his stay . . . . . has a considerable degree of permanence" and that in determining this question of fact three principles should be applied: first, a man can have two residences and be regarded as resident in both; second, mere temporary presence does not constitute residence; and third, temporary absence does not deprive a person of his status as resident. Similarly women who were illegally camped on land outside a United States Air Force Base at Greenham Common, where they slept in various constructions or in the open air, were allowed to register as electors for the constituency in which the base was situated : Hipperson -v- Newbury Elector Officer [1985] 1 Q.B 1060 (Court of Appeal). The Master of the Rolls (Donaldson) thought it "nothing to the point that, in theory, they might have been required to leave shortly thereafter" (page 1073 F). By parity of reasoning, the fact that Mr Fuko's presence in Ma'ufanga is precarious because he is living there without the consent of the Estate Holder, who has more than once evinced a desire to have Mr Fuko removed-but never done anything concrete to implement such an intention - does not deprive the Ma'ufanga home of its status as one of Mr Fuko's two residences. In New Zealand residence is the test for electoral registration and a person is deemed to reside "where he has his usual place of abode" notwithstanding occasional or temporary absences; absence in the course of one's employment; absence in the service of the Crown or "as a Member of Parliament: Section 37 of the Electoral Act 1956. The 1955 Act is quite obviously the model for the Tongan 1989 Act, albeit this country's Act is a much truncated version of the New Zealand Act and, introduced a materially different residence qualification. In Re Wairarapa Election Petition [1988] 2 NZLR 74 a full bench of the High Court of New Zealand equated residence with usual place of abode and regarded this as (page 81) -

> ". . . 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 base for his daily activities. . . . "Usual" in this context we think connotes a degree of regularity and frequency not necessarily continuous in the sense of being uninterrupted, but at least continual in the sense of being repetitive".

Unlike the United Kingdom, in New Zealand one can only reside in one place for the purpose of electoral registration.

> "While the whole tenor of Section 37 suggests to us that the issue of residence is to be determined objectively by reference to the facts . . . (the provisions of subsecion 5 that where a person has more than one abode he shall be deemed to reside in the place where he spends the greatest part of his time) seems to us a particularly clear direction to have regard to the objective facts rather than to the intentions or sentiments of the person concerned".

There is no special dispensation for Members of Parliament in Tonga as there is in the New Zealand Act. If there had been Mr Fuko's position would have been unassailable. Home ". . . is the place where the centre of gravity of one's domestic life is to be found", where one's wife lives, and may be said to be the place where one resides: see Regina -v- Norwood (1867) LR 2 QB 457 per Blackburn J. at page 459; Geothermal Energy NZ Limited -v- Commissioner of Inland Revenue [1979] 2 NZLR 32 per Beattie J. at page 34; and Thomas -v- Bensted (1918) 7 TC 137 per Lord Scott Dickson. If "home" were the test in Tonga, Mr Fuko would require to register in Tongatapu. On the other hand if the test had been "residence" or even "ordinary residence" then, having regard to the

whole facts in this case, I would have been prepared to hold that Mr Fuko qualified for inclusion in the electoral roll for Ha'apai. The problem is the adverb "permanently" in Section 4(4)(b) of the 1989 Act.

Permanent is a relative term, not synonymous with "everlasting", but indicative of something which will continue for an indefinite period: Henriksen -v- Grafton Hotel [1942] 2 KB 184 and Jones -v- Llanrwst, 80 L.J. Ch. 150. In the context of residence a requirement for permanence has been held to imply that there must be no animus revertendi ; Re Coxen [1948] 2 All E.R. 492. Similarly a company whose sole trading business was in Ireland did not have a permanent establishment in Canada even though incorporated in Ontario and having its head office there whereat certain business of a financial nature was transacted : Tara Exploration and Development Company -v- M.N.R. 70 DTC 6370. All these cases were decided on their own special facts. Nevertheless they do indicate that permanent is a term which has troubled the Courts. In this case I do not see how a home in Ha'apai at which a person resides for only about four months of the year properly can be described as his permanent residence. As a simple matter of definition patently it is not. In the Oldham Election Petition, Baxter's Case (1869) 20 LT 302 Blackburn J. at page 308 said that "We must consider the residence to be where the voter sleeps habitually". That case is no longer relevant for electoral registration purposes but I would probably find little difficulty in describing the place where a voter habitually sleeps as his permanent residence. But Mr Fuko cannot be said to reside habitually at Ha'apai. I was given no guidance as to why Parliament in 1989 chose to qualify the term "reside" with the adverb "permanently". I must assume it was intentional, although it could have been inadvertently employed, someone mistakenly considering it synonymous with ordinary or usual place of residence. In the result it matters not, for I must look to the actual language employed in the enactment. My consideration of the requirements of Section 4(4)(c) of the 1989 Act lead me to conclude that the effect of this subsection is effectively to debar all Representatives of the People for the Districts of Vava'u, Ha'apai, 'Eua and the Niuas from re-election, for they could never satisfy the test of permanent residence in their own district or in Tongatapu, unless they were the holder of a Tax Api and could avail themselves of the provisions of Section 4(4)(a). I really do not believe that this result was foreseen by the draftsmen of this Act. It means in effect that only the holder of a Tax Api i likely to be able to stand for Parliament to represent there Island constituencies, thus curtailing the parliamentary aspirations of citizens with no Tax Api, of whom there are a considerable number. Clause 65 of the Constitution entitles one to stand for election if qualified to be an elec or and the constitutional qualifications for that as already noted make no mention of the holding of a Tax Api, nor of the quality of ones residence. Furthermore, Clause 4 of the Constitution provides that -

> " . . No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this land".

A law which gives electoral rights to land holders which are effectively denied to the non land holding class fails to satisfy the provisions of Clause 4. There must of course be administrative arrangements introduced by legislation to enable an electoral roll to be prepared, and some mechanism for allocating electors to the Constituencies or electoral districts into which this country is divided. However their provisions must be consistent with the Constitution. Legislation cannot alter, diminish or augment the requirements of

Clause 65 as to the qualifications of electors, unless it takes the form of a Constitutional amendment, which the 1989 Act is not. In my opinion that in fact is what Section 4(4) purports to do, namely to amend the Constitution. That is wrong. Section 4(3) is an administrative mechanism which on the arguments I heard I do not consider to be at variance with the Constitution. It is the ensuing subsection which causes the difficulty. Such problems will arise inevitably when foreign legislation is adapted for use in Tonga unless careful consideration is given to the terms of the local law. New Zealand has no written Constitution properly so-called and their Electoral Act comprises a complete statement of electoral law. Tonga does, and any Electoral Act must not conflict with the Constitution. Section 4(4) is at variance with the Constitution. As to Mr Fuko he is qualified as an elector in terms of Clause 65 of the Constitution; and conform with the requirements of Section 4(3) of the 1989 Act his name is entered on the electoral roll for Ha'apai, where he has a residence. He need not comply with the requirements of Section 4(4) for that subsection is contrary of the Constitution, ultra vires, and of no effect. He was therefore entitled to stand as a Candidate at the 1993 General Election for Ha'apai. The Petition insofar as directed against him is therefore dismissed.

A similar result must ensue in the case of the Second Respondent Mr Uata. He complies with the constitutional provisions for candidature. He also has a residence in Ha'apai which is all that Section 4(3) of the 1989 Act requires for inclusion on the Ha'apai electoral roll. It is however only fair to add that I am not persuaded that he has his permanent residence there, nor even his ordinary or usual place of residence. His habitual residence is in Nuku'alofa and his visits to Ha'apai, on his own admission, are relatively brief and infrequent. He certainly intends in the future to relocate permanently to Ha'apai but he has not done so yet. Unlike Mr Fuko he has a Tax Api in Ha'apai. I am satisfied on the evidence that he was granted this land at a general allocation by the Estate Holder in 1966. He failed to register this grant until recently. The Respondents were suspicious of this. It does seem an unpardonably long time to effect registration. Mr Uata's subsequent land dealings at Pelehake are clearly tainted with illegality, but there is nothing illegal or improper about the grant of land to him in 1966 in Ha'apai. In Tu'i'afitu and Another -v- Moala, Privy Council 25th January 1957, it was stated that -

> "That learned trial Judge held that the Respondent had taken all the steps required by the Land Act, Section 76 and that whilst registration is evidence of ownership it is not always necessary to prove registration before ownership can be established. With this statement of the law we agree".

So do I, subject to the substitution of "land holding" for "ownership" in Tonga only the Monarch may be said to own land (and sale of land is prohibited by Clause 104 of the Constitution). Others may only lease or hold land. Hunter J. in Manakotau -v- Noble Vaha'i, (31st March 1959) also considered that registration was nothing more than a method of proof.

This was a very lengthy case (8 days) involving a whole day sitting on Saturday, the calling of some 40 witnesses or thereby, and the production of over 70 documents or registers. It required detailed legal submission and close attention to detail by Counsel. I am much obliged to them both for the quality of their research and submission and the courteous way in which they conducted their respective cases.

Accordingly I order and adjudge that the Petition be dismissed.