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

MISC NO. 113/2010
[RAKAHANGA]

IN THE MATTER	of the election of the Members of Parliament of the Cook Islands held on the 17th 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	**TOKA HAGAI**
	Petitioner
AND	**TAUNGA TOKA**
	First Respondent
AND	**TAGGY TANGIMETUA**
	Second Respondent
AND	**MARK TEREI SHORT**
	Third Respondent

Hearing: 1 February 2011
(Held in Rarotonga)

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

Judgment: 1 February 2011

ORAL JUDGMENT OF THE HON. WESTON CJ

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[1] The General Election was held on 17 November 2010. The First Respondent, Mr Toka, was declared the successful candidate in the Rakahanga constituency. According to the Public Notice given on 25 November 2010 he received 30 votes. The Petitioner received 28 votes, a difference of two votes.

[2] The Petitioner filed an Election Petition and, then, on 8 December 2010, an amended Petition, which brought qualification challenges in respect of five named electors. Those challenges were brought in terms of s 7 of the Electoral Act 2004 ("the Act"). During the course of the hearing before me today one of those challenges was withdrawn in relation to Ms Greig. As a result, there were four challenges for determination, three of which were met by an argument that their absences were justified on medical grounds and the fourth on the basis that the absence did not exceed three months.

[3] The First Respondent lodged a counter-Petition on 15 December 2010 and raised another seven or so qualification objections. During the course of the hearing three of these were withdrawn. At the time of delivering this decision I have not heard argument in relation to the counter-Petition. Counsel are agreed that I will give this decision first in relation to the Petition.

The law

[4] In deciding the Election Petition for Mangaia yesterday I dealt with some of the issues that are also alive before me today. During the course of argument yesterday, and in giving my decision, I referred to an earlier decision of the former Chief Justice: *Kairua v Solomoana and Hagan*,[1] and then a subsequent decision of David Williams J given in *Akatapuria v Taripo & Ors*.[2] A statement of the law given by the Chief Justice in *Kairua v Solomoana and Hagan* was adopted by Williams J. In my decision yesterday I said I found the ruling persuasive, and in terms of how I

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

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

assessed the facts it was not necessary to deal with a reservation that I had in relation to the summary by the former Chief Justice.

[5] Prior to commencing the hearing today I mentioned that reservation to counsel in case it became relevant on the facts of this case. That reservation concerned the previous finding of this Court that unless the elector had the requisite purpose at the point of leaving the constituency the exception in s 7(6)(a)(ii) would not apply. While I appreciate that the statement of the law by the Chief Justice sets a very high standard, and necessarily so, I had a concern that there might be some instances, otherwise deserving, which would be cut out by such an approach. I gave two examples.

[6] The first concerned someone in the constituency of, say, Ngatangiia, who goes into Avarua for the day fully intending to return home that evening. They have an accident while in town and are then airlifted to New Zealand for a period in excess of three months during which they receive medical treatment. I was concerned that a strict application of the test in *Kairua* would exclude that person from the effect of s 7(6)(a)(ii).

[7] The second example I gave concerned someone leaving an outer island, and I gave as an example an intention to come to Te Maeve Nui for a week or two. Again, while in Rarotonga, this person suffers an accident and is airlifted to New Zealand for treatment. It seemed to me that a strict application of the test in *Kairua* would exclude such a person from the effect of s 7(6).

[8] Both counsel have addressed me in relation to this proposition. Mrs Browne was inclined to accept that a strict application of the test in *Kairua* might exclude some otherwise entitled electors. By contrast Mr Lynch was inclined to uphold the strict words of the *Kairua* test. Mr Matysik took a position somewhere in the middle of the two, suggesting that it was a matter to be assessed on the facts in each case.

[9] Mr Lynch raised a valid point, in that if the test is set too low, there may be a flood-gates effect with the result that the Court would be overwhelmed by Election Petitions and challenges. The concern must be acknowledged but, at the same

time, we must recognise the objections procedure set out in the Act in s 24 et seq. If there were to be wide-ranging abuses of the exceptions allowed in s 7(6) then it would be possible to address these prior to the Election through that procedure.

[10] Having said that, I think the floodgates concern is overstated. I have no doubt that the statutory threshold in s 7(6)(a)(ii) is a high one. It will not be satisfied in cases of minor ailments. That is because it will be difficult in those circumstances to show a continuous purpose of obtaining medical treatment for a period in excess of three months. It is highly unlikely that an elector will be able to travel to New Zealand for family purposes, visit a GP once or twice while in New Zealand, and be able to satisfy the Court that they fall within the statutory exemption.

[11] Notwithstanding this discussion, I do not believe I need to resolve the issue in this case. On the findings of fact that I will shortly make, the electors did have the statutory purpose at the point of departure from their constituencies. Nevertheless, the issue has exercised the Court's time and there may well be cases in the future where it arises fairly and squarely. For reasons I will now give I do not believe this is one of them.

The quality of the evidence

[12] Under s 99 of the Act, the Court is entitled to receive such evidence as in its opinion may assist it to deal effectively with the case notwithstanding that the evidence may not otherwise be admissible in the Court. This, I think, is a very realistic provision because it acknowledges that an Election Petition is brought on in circumstances of urgency and where it may be difficult to find evidence of a high quality in all cases. The Act allows a liberal approach to evidence. A case such as the present illustrates the desirability of that provision. Much of the evidence before me was strictly inadmissible. Much of the cross-examination traversed issues upon which the relevant witnesses could not be said to have knowledge or indeed expertise (some of the witnesses were treated as having a de facto expertise). I do not say that in a critical way; simply to register the reality that the parties found themselves operating within.

[13] Part of the difficulty in assessing the medical treatment exception in the Act is that inevitably some assessment needs to be made of medical information and records. The Court, however, is at something of a disadvantage because it is not an expert body. It would be rare that the parties would have time to find sufficient medical expertise in order to produce expert evidence to the Court in the form of oral evidence from an expert. I am not suggesting that they should do this. The Act (in the form of s 99) contemplates that evidence of a different sort might be received. This, though, illustrates that the Court is to make a pragmatic assessment on the balance of probabilities.

[14] Mrs Browne did not call any oral evidence at the hearing. She instead relied upon a series of affidavits and medical records. She produced affidavits from Mr and Mrs Rubena, with medical certificates attached to them. There was also evidence from the nurse practitioner in Rakahanga, and that was produced both by affidavit and by letters from her. Both of Mr and Mrs Rubena are in New Zealand and both are still receiving medical treatment (on the materials that I have seen). I was advised they were not able to be in Rarotonga and I accept that that was the case. Mr Timeteo's case was presented by reference to medical records and evidence form the nurse practitioner. Mr Timeteo is in New Zealand. There was no evidence from him by way of affidavit or otherwise.

[15] This affidavit evidence and other evidence was met by the Petitioner in an affidavit of Mr Takai dated 17 December 2010. At the time of swearing the affidavit Mr Takai was the Mayor of Rakahanga, although he has since lost that position. Mr Lynch called Mr Takai to affirm his affidavit and make himself available for cross-examination. Mrs Browne cross-examined Mr Takai in relation to the evidence given in his affidavit. In that sense, then, his evidence was of a more orthodox character than that relied upon by Mrs Browne. That is because the deponent was called for cross-examination and was then cross-examined.

[16] Having said that, I find that Mr Takai's evidence was subject to limitations. First, there are a number of areas where he by necessity resorted to speculation because the matters were not directly within his knowledge or expertise. Secondly, I am bound to say that in some respects I found that Mr Takai coloured his evidence

as if he were acting as an advocate for the Petitioner. Therefore, I find that wherever is a conflict between his evidence and that of the First Respondent, I prefer that of the First Respondent. Mr Hagai, the Petitioner, gave evidence. It was of a fairly limited dimension. I found him an entirely straightforward witness but I do not gain much assistance from his evidence because it really did not go to the heart of the matters for decision.

[17] So drawing the various threads together, I am left in the position where the overall quality of the evidence is not as high as might otherwise be desirable. Nevertheless, I am bound to make of it what I can and s 99 points me in the right direction. Having considered all the evidence I find the written letters from Dr Tangaroa and the materials from the nurse practitioner to be of the most assistance.

Mr and Mrs Rubena

[18] Both Mr and Mrs Rubena left the Island of Rakahanga on 23 July 2010 and they have not returned since then. I am satisfied that they did leave the Island for medical treatment in terms of s 7(6)(a)(ii). Mr Lynch made submissions to the contrary, which I will shortly address. In making this assessment I have relied upon the letters attached to Mr Rubena's affidavit, particularly the second one dated 16 December 2010. I have also regard to what the nurse practitioner says. While Mr Rubena's affidavit is not regarded by me as evidence to be accepted without question, I have been influenced by paragraphs 3, 4 and 11 where he makes it clear that in his view of it he left Rakahanga to seek medical treatment for illnesses that both he and his wife believed they suffered. The fact that they then learned further details about the nature of those illnesses does not in any way mean that they did not leave Rakahanga for the original purpose of seeking medical treatment.

[19] A number of matters were raised by way of argument against the conclusion that Mr and Mrs Rubena left for medical reasons. One of these concerned the role of the Government Representative, but in the final analysis both counsel agreed that that was not material. The most significant issue concerned an argument that Mr

and Mrs Rubena left Rarotonga to attend a child's birthday party and then, in February of this year, Mr Rubena's 60th birthday party.

[20] I am prepared to accept that Mr and Mrs Rubena did attend the child's birthday party and have an intention also of attending Mr Rubena's 60th birthday party. I do not think that in any way derogates from my conclusion that the purpose that Mr and Mrs Rubena had when they left Rakahanga was to undertake medical treatment. I accept there can be difficult issues of multiple purposes, but I was left with an overwhelming sense that Mr and Mrs Rubena left Rakahanga to obtain medical treatment. The fact that both are now found to be suffering serious ailments strongly points to them having had such a purpose from the outset.

[21] In setting out the materials above I have not expressly addressed those matters supporting Mrs Rubena's case. I have had regard to them in the same way as I have had regard to those supporting Mr Rubena's, and I have generally tended to approach the two of them in parallel. I have had regard to Mrs Rubena's affidavit and make the same weighting of that as I have Mr Rubena's. I have had regard to paragraphs 4, 8 and 11 of Mrs Rubena's affidavit.

Mr Timeteo

[22] I accept that Mr Timeteo is the same man referred to in some of the medical records as Mr Tetini. It seems that his passport name is Mr Tetini but he normally goes by the name referred to in the Petition. I found Mr Timeteo's case more difficult than that of Mr and Mrs Rubena. I am not assisted by the absence of an affidavit from Mr Timeteo, although that by itself is not fatal.

[23] A significant difference between the case of Mr Timeteo and that of Mr and Mrs Rubena is the statement made on several occasions that Mr Timeteo's purpose was to live permanently in New Zealand. For example, this is referred to in the medical records of the Ministry of Health. There is an International Patient Referral Form dated 27 September 2010 and that says that Mr Timeteo's intention was to live permanently in New Zealand.

[24] The burden of proof is on Mrs Browne's client. I am not satisfied that she has discharged that in relation to Mr Timeteo and, therefore, I find that the Petition in relation to him is upheld.

Mr Tupou

[25] At the outset there was some uncertainty as to the dates during which Mr Tupou was absent from Rakahanga. Initially the amended Petition was silent on the point. Mr Lynch then received instructions that the correct date was 24 May 2010, but it is now common ground that he left on 31 May 2010. It is also common ground that he returned to Rakahanga on 31 August 2010. In these circumstances, Mr Lynch argued that Mr Tupou was absent from the particular constituency for a continuous period exceeding three months and thus fell within s 7(4) of the Act. He then submitted there was no saving explanation for Mr Tupou's absence and therefore his vote should be disallowed.

[26] The issue for determination is whether absence as between 31 May 2010 and 31 August 2010 is for a period exceeding three months. Mr Matysik referred me to the definition of *'month'* as appears in the Acts Interpretation Act 1924. It refers to a calendar month. There is no alternative definition in the Electoral Act. There is no evidence before me as to the time on 31 May 2010 that Mr Tupou left the Island, and equally there is no evidence before me as to the time on 31 August 2010 that he returned. In these circumstances, I assume that the first full day's absence is 1 June 2010. Thereafter Mr Tupou was absent for the full months of June and July and he then returned on 31 August. On my assessment, he was not absent for a period in excess of three months. Therefore, I reject the Petition in relation to Mr Tupou.

Conclusion

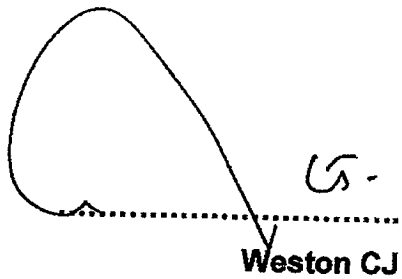
[27] The conclusion of my factual assessments above means that the Petition is upheld in one respect. That is the vote of Mr Timeteo. I do not know how he voted but his vote should be not counted as part of the outcome of the Election. As the difference between the two candidates was two votes it seems to me, therefore,

unlikely that the removal of this vote will make any difference to the outcome of the Election.

[28] Having got to this point in my decision I asked Mrs Browne what she wanted to do with the counter-Petition. In light of my conclusions she indicated she did not wish to proceed with it and it was to be treated as withdrawn.

Costs

[29] Costs are reserved.



Weston CJ