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

CA 8/99

IN THE MATTER OF the Electoral Act 1998

BETWEEN **THE ATTORNEY-GENERAL**

First Appellant

AND **STEPHEN MICHAEL WEARING** of Rarotonga, Chief Electoral Officer

Second Appellant

AND **ROBERT WOONTON** of Rarotonga, Member of Parliament

Respondent

Hearing: 12 August 1999

Corum: The Hon Sir Graham Speight JA (Presiding)
The Hon Sir Ian Barker JA
His Honour Justice A G McHugh JA

Judgment: 30 August 1999

JUDGMENT OF COURT –delivered by
His Honour Sir Graham Speight JA

Counsel: A M Manarangi for the First and Second Appellants
M C Mitchell for the Respondent

Decision

On the 21st of May 1999 Robert Woonton of Rarotonga, Member of Parliament applied to the High Court at Rarotonga for a declaratory order under the Declaratory Judgments Act 1994 to determine questions as to the construction of sections 12 and 112 of the Electoral Act 1998 in respect of the constituency of Manihiki and in anticipation of the then forthcoming election set down for 16 June 1999.

This case revolves around the voting qualification rights of those persons who were forced to evacuate the island of Manihiki when it was struck by a hurricane causing wide spread devastation in November 1997.

It appears that consequent upon the storm many of the residents (herein for convenience called "the evacuees") left Manihiki by air and sea. Since the hurricane, reconstruction work has been and continues to be carried out on Manihiki. In the statement of claim supporting the application, the applicant stated there was no electricity on the island and the Island Council had discouraged persons from returning until utilities and other infrastructural work had been completed. The applicant also claimed that at the last general election in 1994 there were 280 names entered on the Manihiki electoral roll and it was estimated there were currently approximately 200 voters on the island and approximately 60 voters residing in other electorates on Rarotonga or in New Zealand.

The applicant also claimed that those of the evacuees who have and always have had an intention to return, have not lost their usual place of abode which remains in Manihiki. The applicant sought a declaration from the High Court on two questions

1. Does section 12 of the Electoral Act 1998 require the evacuees to register as electors on a roll other than that of the Manihiki constituency? and;

2. Can the application of section 12 of the Electoral Act 1998 be avoided by the Chief Electoral Officer exercising his discretion pursuant to section 122 of the Electoral Act 1998 to enter the names of the evacuees upon the roll for the constituency of Manihiki?

The application came before the Court (Qulliam CJ) on 21 May 1999. The applicant Robert Woonton was represented by Mr M C Mitchell and the two respondents named in the application – The Attorney General as First Respondent and Stephen Michael Wearing of Rarotonga Chief Electoral Officer as Second Respondent – were represented by Ms Janet Maki of Crown Law Office.

Written submissions were presented by both counsels.

Mr Mitchell submitted that the evacuees left Manihiki because of an "act of God" which was not foreseen and that the place of residence of such persons had not changed and they had an intention to return to Manihiki and live there permanently.

Section 12 of the Electoral Act 1998 provides the rule determining place of residence. It reads:

> 12. Rules for Determining Place of Residence within the Cook Islands – (1) The place where a person resides within the Cook Islands at any material time or during any material period shall be determined for the purposes of this Act by reference to the facts of the case.
>
> (2) For the purposes of this Act a person can reside in one place only.
>
> (3) A person shall be deemed to reside where that person has a usual place of abode notwithstanding:
>
> (a) any temporary absence for the purpose of undergoing a course of education or of technical training or instruction; or
> (b) any occasional absence for any period not exceeding 3 months for any other purposes; or
> (c) any temporary absence for the purpose of undergoing medical treatment or being required to accompany an immediate family member or relative for the purpose of undergoing medical treatment.
>
> (4) A person who has more than one place of abode and who is qualified to be an elector for a constituency in the Cook Islands shall be deemed to reside in the Cook Islands where the greatest part of that person's time was spent during the 3 months immediately preceding the date of that person's application for registration for enrolment.

> (5) A person who permanently left a former place of abode shall be deemed not to reside at that place, notwithstanding that, that person's place of abode for the time being is temporary only.

Section 12 sub-section (3) seems to spell out the criteria governing place of residence. Mr Mitchell argued that the wording of section 12(3) namely

> "A person shall be deemed to reside where that person has a usual place of abode"

was important and that an enforced departure because of the hurricane would be a sufficient reason to say that such persons had their "*usual places of abode*" in Manihiki.

Mr Mitchell suggested section 12(5) may also be of assistance. Mr Mitchell referred then to provisions in the Constitution which he claimed were supportive of the applicant's case.

Ms Maki in extensive submissions on behalf of the two respondents stated that records in the Electoral Office showed there were 359 members on the roll for the previous election in 1994 and voters currently residing in Manihiki numbered 268. Ms Maki referred to sections 13, 16 and 26 of the Act and in particular the duty of every Registrar to ensure the roll was complete and "*to remove from the roll .... the name of every person ... who ceases to reside within that constituency*". Mr Maki referred to certain case law going to the question of the place of abode. She submitted that it would be ultra vires the Chief Electoral Officer's discretion in section 112 to validate something that under the provisions of the Act and the constitution were found to be invalid.

On 24 May the Chief Justice gave his decision. He found that the Chief Electoral Officer was required by section 12 to consider in respect of each person where that person resided for the purpose of registration.

The learned judge found that section 12 was explicit and that if that was the only statutory provision, then the evacuees were prohibited from claiming Manihiki as their constituency. The Chief Justice referred to the finding of the full Court of the High Court of New Zealand in re Wairarapa Election Petition (1988) 2 NZLR 74 and accepted the

definition given in that case that the place of abode was "*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 place for his daily activities*". However the Chief Justice stated attention must be also given to section 112 which provides:

> 112. Discretion of Chief Electoral Officer – Where
> (a) any provision of this Act cannot be carried out by reasons of lack of communication between any islands or by reason of an act of God;
>
> or
>
> (b) anything is omitted to be done or cannot be done at the time required by or under this Act, or is done before or after that time, or is otherwise irregularly done in matter of form, or sufficient provision is not made by or under this Act the Chief Electoral Officer may, by public notice, at anytime before or after the time within which the thing is to be done, extend that time, or validate anything so done before or after the time required or so irregularly done in matter of form, or make such other provision for the case as he or she thinks fit".

The Chief Justice accepted the applicant's argument that if section 26, which confers on every person qualified to have his or her name entered upon the roll of that constituency, cannot be carried out by reason of an act of God, the Chief Electoral Officer may make such other provision for the case as he or she thinks fit under section 112. The Court emphasised the need for each applicant to apply separately and if in a particular case the desire to return genuinely existed the Chief Electoral Officer could exercise discretion and enrol the applicant.

The Chief Justice made these declarations.

> "1 That, but for the provisions of section 112 of the Electoral Act 1998, section 12 of that Act requires evacuees to register as electors on a roll other than that of Manihiki.
>
> 2 The application of section 12 of the Electoral Act 1998 is capable of being avoided by the Chief Electoral Officer exercising his or her discretion pursuant to section 112 of the Electoral Act 1998 to enter the names of such of the evacuees as is appropriate upon the roll for the constituency of Manihiki".

The effect of these two declarations by the Chief Justice was to affirm the first question that section 12 of the Electoral Act 1998 (hereinafter referred to as "the said Act") required the evacuees from Manihiki Island to register on a roll other than that of the Manihiki constituency. In respect of the second question, the Chief Justice declared that the Chief Electoral Officer had a discretion under section 112 of the said Act to avoid the requirements of section 12 and to enter on the roll the names of such persons as in each case were found appropriate.

The Attorney-General and the Chief Electoral Officer being the two respondents in the High Court proceedings, have now appealed. Counsel for the appellants has submitted that a person's entitlement to be enrolled as an elector is determined in part by place of residence and that the rules relating to residence are found in the Constitution of the Cook Islands and the said Act. Counsel referred to Articles 1(1) and 28 of the Constitution and to section 123)(a) and (b) of the said Act and submitted these provisions were clear in defining residency. Mr Manarangi argued that the statutory intention was a direction to determine residence by reference to objective fact and not by subjective intention. He further submitted that the discretion given to the Chief Electoral Officer could not be exercised contrary to unambiguous legislative intention.

Counsel for the respondent submitted that the words "*by reference to the facts of the case*" in section 12(1) of the said Act required the Chief Electoral Officer to examine each person's qualification and in so doing to exercise the wide discretion given by section 112. Counsel asserted that the provisions of section 3(a)(b) and (c) were "*deeming*" provisions and were not exhaustive. Mr Mitchell submitted that the words "an act of God" in section 112 could well apply to the Manihiki circumstances. Counsel argued that the Constitution in Articles 17 and 28 gave entitlement to vote and that the definition of "*to reside*" in Article 1(1) related to "*the usual place of abode and section 112 of the said Act was not inconsistent with the Constitution*".

Before passing to examine both counsel's submissions it should be noted that there is no lis or action involved in this appeal nor does any election result depend upon this Court of Appeal's findings.

The proceedings were initiated prior to the elections on 16 June 1999 in a desire no doubt, on the part of the applicant, to ascertain the position relating to the unfortunate persons who were forced to leave Manihiki because of the destruction of their homes.

The appellants in these proceedings have also moved to clarify the future position at election time. Mr Manarangi stated quite simply and properly that the appeal was brought to find out the limits of the power given to the Chief Electoral Officer in section 112.

The Court of Appeal accepts that motivating view as there may well be unforeseen events in the future of similar consequence as the 1997 hurricane.

Respective counsel for the parties have put constructive and helpful argument and referred to case authorities and New Zealand legislation similar to the said Act. Section 112 of the said Act taken in conjunction with section 12(1) may well have been sufficient jurisdiction to require the Chief Electoral Office to deal with each application having regard to the enforced evacuation caused by the hurricane. As put to us by counsel for the respondent such an interpretation might also not be in conflict with and could be supported by Articles 28, 28B and 28C of the Constitution. However the position is different when the effect of Article 1(1) is taken into account. This is the interpretation provision of the Constitution and defines the meaning of the words "*to reside*". The article reads as follows:

> "["To reside" in relation to the Cook Islands or to any constituency in the Cook Islands, means to have a usual place of abode in the Cook Islands, or, as the case may be, in that constituency, notwithstanding any temporary absence for the purposes of undergoing a course of education or of technical training or instruction, and notwithstanding any occasional absence, for any period not exceeding three months, for any other purpose and "resident" and "residing" have corresponding meanings.]"

The word "*resides*" appears in section 12(1) of the said Act.

Having regard to this definition which relates not only to residence in the Cook Islands, as provided for in Article 28, but also includes residency in any constituency in the Cook Islands we accept the succinct argument put to us by counsel for the appellants and we find that the discretion given to the Chief Electoral Officer in section 112 cannot be exercised contrary to the over riding provision in Article 1(1). The Chief Electoral Officer can only exercise his discretion in determining residential qualification in accordance with the limitations imposed by the said Article 1(1).

Any evacuee therefore, who has resided away from Manihiki for a longer period than the three months provided in Article 1(1), ceases to be an elector on the Manihiki roll and his or her correct registration must be determined by that elector's present place of abode. The appeal is accordingly allowed.

Costs

Counsel have made submissions on this matter. Having regard to the importance of resolving doubt on the rights of an elector to qualify for a vote this Court of Appeal has decided that there should be no costs allowed against the respondent. The Court considers that the public interest has been well served by the respondent initiating this proceeding in order to clarify voting entitlement. Both counsel have made full and careful submissions and the Court of Appeal considers this a slightly unusual case and one which requires that some contribution towards the respondent's costs should be met from the public account. Accordingly, an award of $1,000 costs plus disbursements to be fixed by the Registrar including airfares on an apportioned basis having regard to counsel's involvement in New Zealand on other appeals, is made in favour of the respondent against the First Appellant.

For the Court of Appeal