

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

Application No.OA 14/2004

IN THE MATTER the General election to
be held on 7 September 2004

AND in the matter of section 28 Electoral
Act 2004

BETWEEN **Emile Kimiora Kairua**
Of Manihiki Elector
Applicant

AND **Taroma Solomona**
Registrar for the
constituency of Manihiki
First Respondent

AND **Brian Terrence Hagan**
Chief Registrar of Electors
Second Respondent

Mr H Puna for Applicant
Mr J McFadzien for Respondents
Mr Little for 3 electors
Date of hearing: 2 August 2004
Date of decision: 2 August 2004

DECISION OF GREIG CJ

- [1] The Applicant objected, pursuant to section 23 of the Electoral Act 2004 (the Act), to the names of 7 electors whose name appeared on the roll of electors in the constituency of Manihiki. Following the First Respondent's (the Registrar) decision to retain three of the electors on the roll the Applicant has applied pursuant to s. 28 of the Act to the Court for a review of the Registrar's decision.
- [2] I received a number of documents by fax and have heard Counsel by telephone conference. It has been necessary to deal with this application with urgency as, depending on the result, the Chief Registrar will have to complete the rolls and have them distributed in time for the election on 7 September 2004. As a result the parties have been unable to produce all the documentation and supporting evidence which might have been helpful
- [3] Objections in respect of two of the electors Louisa Mairi and Rahui Samasona Piniata have been produced. The objection, under review, of Taroma Ripata has not been produced and the Registrar has stated that there is no such objection. That matter was left over for further consideration by Mr Puna. Mr Little advised that the elector had left Manihiki on 11 March 2004 and returned there on 11 June 2004.
- [4] The two objections dealt with were dated 22 June 2004. Mr Mc Fadzien proposed that the Registrar's decision, under s. 27 (3) of the Act, was made on 30 June 2004 in the form of a fax of that date which contains some comment on the objection and the hand written word "retain" beside the two electors. There is no evidence that the Registrar complied with s. 25 giving notice to the elector or that the elector provided any evidence, pursuant to s. 27 (2), of the qualification to be on the roll. Likewise there is no evidence that the Registrar gave notice of the decision on the objection in accordance with s. 27 (2). Mr McFadzien did not suggest that there had been any notification in writing or orally. Mr Puna informed me that the objector became aware of the Registrar's decision when the supplementary roll became available on Saturday 10 July 2004. The application to review was filed in Court on 16 July 2004. I note the faxed letter dated 21 July 2004 from Taggy Tangimetua to the Registrar referring to a conversation on 16 July in which it was said that the Registrar had advised the Applicant of the decision and asking the Registrar to confirm that in writing. I am not aware of seeing any reply.
- [5] It was submitted that the application was out of time. The time limit under s. 28 is " within 7 days of the Registrar's decision being made". Clearly the application was made later than 7 days after the decision if that was the document of 30 June 2004. It was in time if it was timed from the date the objector first knew of the decision by the publication of the supplementary roll.
- [6] I believe that, in spite of the wording of the section, the time runs from the time the objector first knows of the decision. There is the difficulty of the lack of knowledge of the elector's address and the difficulty of communicating with

electors in distant parts of the Cook Islands or beyond the Cook Islands. That is at least in part resolved by the provision in ss. 25 and 26 which deems the last known address as a sufficient address. That must apply equally to the Registrar's decision. It is also to be noted that this is the only appeal right in respect of the names on the roll. There is now no right to petition after the election about the names or absence of names on the roll. It would be wrong in these circumstances to prevent a right of review by the absence or lateness of notice of the decision when there is an obligation on the Registrar to give that notice.

- [7] In my judgment the application to review was made in time.
- [8] **Louisa Mairi.** The elector was on the main roll. In July 2003 she went to Rarotonga to take part in constitutional celebrations. She went to New Zealand arriving on 19 August 2004. She was ill on the plane and according to her affidavit she was taken to hospital in Auckland. She was diagnosed with diabetes, hypertension and a weak heart. She swears that she was advised to stay in New Zealand and underwent medical treatment until 29 May 2004 when she returned to Rarotonga. She has not yet returned to Manihiki. She has been absent from the Cook Islands and Manihiki for a continuous period exceeding 3 months. The question is whether she is entitled to the benefit of s. 7 (6) (a) (ii). Is her period of absence not to be regarded or treated as absence because it is a "continuous period not exceeding 4 years spent by her outside of the constituency for the purpose of medical treatment".
- [9] I note that there are no medical certificates or other evidence to support the diagnosis, the treatment or the length of it. The onus of response to the objection is on the elector objected to. The elector must respond within 7 days of the notice of the objection and satisfy the Registrar of eligibility to be on the roll. On review that onus must remain to satisfy the Court that the elector is eligible to be on the roll.
- [10] The real issue is the meaning and import of the subsection. On the one hand it is said that the meaning is that the absence must be for the purpose of medical treatment and that takes effect from departure. It does not cover absence which occurs after some subsequent event or diagnosis following departure and absence for other non-qualifying reasons. The contrary argument is that the absence may begin when the medical treatment is required. That the clock stops, the time stops running, during an absence when the purpose of medical treatment intervenes and does not start again till that treatment ceases or 4 years elapses.
- [11] The underlying reason for this allowance of absence is that in the Cook Islands or in the outer islands there is an absence of educational and medical facilities. Electors are compelled to travel away from the constituency for these purposes. The absence is, in terms, for the purpose of medical treatment or education. A person who has gone for some other purpose does not remain absent for medical purposes. The absence continues because of some event or diagnosis and for the

reason or the benefit of medical treatment. It is not then a continuous period of absence for the purpose of medical treatment but partly for some other purpose and thereafter for medical reasons. I consider that the true meaning is that the absence to qualify for this special treatment must have the purpose, at the outset and for the continuous period of it, of medical treatment. The contrary argument does not take account of the references to continuity and to purpose which encapsulate the underlying intention and meaning of the provision.

[12] The elector lost eligibility to remain on the roll. The decision of the Court is that the elector's name be removed from the roll for the constituency of Manihiki.

[13] **Rahui Samasona Piniata.** This elector traveled out of the constituency in October 2003 travelling to New Zealand. The purpose was to attend his sick wife. He has not returned to Cook Islands. His purpose was not to receive medical treatment. There can be no doubt that the special allowance only applies to the person who receives the treatment. Mr Little advised that he had spoken to the elector by telephone in New Zealand after he had returned from Australia. It is alleged that the elector himself at some time was diagnosed as needing medical treatment in New Zealand. The period of treatment and the need for it was unsupported by any medical certificates or other advice. In any event this must be treated as the same as the previous review. The absence was not a continuous one for the purpose of medical treatment of the elector.

[14] The elector lost eligibility to remain on the roll. The decision of the Court is that the elector's name be removed from the roll for the constituency of Manihiki

Laurie Greig CJ