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

MISC. NO. 942/2022

BETWEEN **MARGHARET MATENGA**
Petitioner

AND **SONNY WILLIAMS**
First Respondent

AND **CHIEF ELECTORAL OFFICER**
Second Respondent

Hearing: 6, 8 and 9 March 2023

Appearances: Mr B Mason for the Appellant
Messrs I Hikaka and B Marshall for the First Respondent
Mr L Annandale, Solicitor-General, and Ms M Pittman for the Second Respondent

Result Judgment: 10 March 2023

Reasons Judgment: 2 May 2023

REASONS FOR JUDGMENT OF TOOGOOD, J

Introduction

[1] On 13 June 2022, the 49th session of the Parliament of the Cook Islands was dissolved by the Queen's Representative. After the appropriate formalities had been completed, the general election was held on 1 August 2022. On 11 August 2022, the Chief Electoral Officer declared by public notice in the Cook Islands Gazette that Mr Sonny Williams, the first respondent in this proceeding, was duly elected as the Member of Parliament for the Titikaveka constituency.

[2] The Chief Electoral Officer also declared that the candidates who contested the election in the Titikaveka constituency received the following numbers of votes:

(a) Teava Iro (Independent) – 69 votes

(b) Margharet Matenga (Cook Islands United Party) – 228 votes

(c) Selina Napa (Democratic Party) – 212 votes

(d) Sonny Williams (Cook Islands Party) – 231 votes

[3] Ms Matenga, the applicant, was dissatisfied with the result, having polled only 3 votes fewer than Mr Williams.[1] She petitioned the Court for an inquiry into the conduct of the election under s 92 of the Electoral Act 2004 (the Act).

[4] In essence, Ms Matenga argued that, at the time of the election, three of the electors who cast votes in the Titikaveka constituency were, having regard to Art 28 of the Cook Islands Constitution,[2] either not qualified to vote or had been disqualified from voting, at the date of the election. Relying on s 7 of the Act, she argued that a fourth elector who voted in Titikaveka was not entitled to vote in that constituency. I refer to the four electors as "the challenged electors".

[5] Ms Matenga asked the Court, upon inquiry into those grounds, to hold that the votes of the challenged electors should be declared to be invalid and to determine that Ms Matenga, and not Mr Williams, was duly elected to represent the constituency of Titikaveka in the Parliament.

[6] It was agreed by all counsel on behalf of the parties that:

(a) if the votes cast by two or more of the challenged electors were declared to be valid, the outcome of the election as declared by the Chief Electoral Officer would not alter and that Mr Williams must be determined to have been duly elected; and

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1 On 28 September 2022, a recount of the votes cast in the Titikaveka constituency was conducted under s 79, Electoral Act 2004 on the application of one of the candidates, Selina Napa. The outcome affirmed the votes received respectively by each of the candidates and the result of the election.

2 The Constitution of the Cook Islands was originally enacted by the Parliament of New Zealand in the Cook Islands Constitution Act 1964.

(b) if the votes cast by three or all four of the challenged electors were declared to be invalid, a further inquiry into the nature of the votes cast would be necessary before the Court could determine which candidate was duly elected.

[7] On 10 March 2023, I issued a result judgment in which I determined that, at the date of the general election on 1 August 2022:

(a) Ina Bishop was disqualified under art 28(2) of the Constitution from being an elector for a Member of Parliament for any constituency and that her vote in the Titikaveka constituency should not have been counted.

(b) Brendan Platt was not qualified under art 28(1)(b) of the Constitution to be an elector for a Member of Parliament for any constituency and that his vote in the Titikaveka constituency should not have been counted.

(c) Aere Vainu was qualified under art 28(1) of the Constitution and ss 7(1), 7(2) and 7(6)(a)(ii) to be an elector for a Member of Parliament for the Titikaveka constituency and that her vote was validly counted.

(d) Tuaine Papatua was qualified under arts 28(1) and 28(4)(a)(ii) of the Constitution and ss 7(1), 7(2) and 7(6)(a)(ii) to be an elector for a Member of Parliament for the Titikaveka constituency and that his vote was validly counted.

[8] I determined that, in the general election held on 1 August 2022, Sonny Williams was duly elected as the member for the Titikaveka constituency. Under s 104(1) of the Act, I certified that determination to the Chief Electoral Officer accordingly.

[9] These are my reasons for those decisions.

Disputed elections

[10] Disputed general elections in the Cook Islands are provided for under part 8 of the Act, the relevant provisions of which are:

> 92. Election petitions - (1) Where any candidate or five electors are dissatisfied with the result of any election held in the constituency for which that candidate is nominated, or in which those electors are registered, they may, within seven days after the

declaration of the results of the poll by the Chief Electoral Officer by petition filed in the Court demand an inquiry into the conduct of the election or any candidate or other person thereat.

(2) Every petition shall be accompanied by a filing fee of $1,000.

(3) The petition shall be in Form 14 and shall be heard and determined before a Judge of the Court.

(4) The petition shall allege the specific grounds on which the complaint is founded, …

…

94. Candidate may oppose petition - Any candidate or other interested party (if any) may, at any time before the commencement of the inquiry, file in the Court a notice in writing of his or her intention to oppose the petition, and thereupon the candidate or other interested party (if any) shall be deemed to be a party to the petition.

…

96. Jurisdiction on inquiry - (1) Subject to this Act, the Court shall have jurisdiction to inquire into and adjudicate on any matter relating to the petition in such manner as the Court thinks fit.

(2) For the purpose of the inquiry, the Court shall have and may exercise all the powers of citing parties, compelling evidence, adjourning from time to time and from place to place, and maintaining order that the Court would have in its civil jurisdiction, and, in addition, may at any time during the inquiry direct a recount or scrutiny of the votes given at the election.

(3) Notwithstanding subsection (1), no petition may be filed or inquired into on the grounds that any person's name was or was not on a roll by reason of the presence or absence of that person in or from a particular constituency.

…

99. Real justice to be observed - At the hearing of any election petition the Court shall be guided by the substantial merits and justice of the case and the Court may admit 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.

…

102. Decision of Court to be final - (1) Every determination or order by the Court in respect of or in connection with any proceedings under sections 28, 34, or 79, or in respect of or in connection with an election petition shall be final and conclusive and without appeal.

(2) Notwithstanding the provisions of subsection (1), where any party to any proceeding to which this section applies is dissatisfied with any decision of the Court as being erroneous in any point of law, that party may appeal to the Court of Appeal by way of case stated for the opinion of that Court on a question of law only.

(3) In its determination of the appeal, the Court of Appeal may confirm, modify or reverse the decision appealed against or any part of that decision.

(4) Notice of appeal shall not operate as a stay of proceedings in respect of the decision to which the appeal relates unless the Court or the Court of Appeal so orders.

(5) The determination of the Court of Appeal on any appeal to which this section applies shall be final and conclusive and without further appeal.

…

> 104. Certificate of Court as to result of election - (1) At the conclusion of the hearing of an election petition or the appeal, the Court or the Court of Appeal as the case may be, shall determine whether the member whose election or return is complained of, or any and what other person, was duly elected or returned, or whether the election was void, and shall forthwith certify in writing the determination to the Chief Electoral Officer.
>
> (2) Forthwith upon receipt of written certification pursuant to subsection (1), the Chief Electoral Officer shall notify the Speaker.

[11] On 18 August 2022, Ms Matenga filed a petition for an inquiry under s 92 of the Act. After amendments, Ms Matenga's petition asserted that eight electors who voted in the constituency of Titikaveka were not qualified for registration as electors, not entitled to vote and/or that their vote should be disallowed.

[12] On 8 September 2022, Mr Williams filed a notice under s 94 of the Act expressing his intention to oppose the petition. In addition to explaining the reasons why he considered that each of the challenged electors was qualified to be an elector in the Titikaveka constituency, Mr Williams also asserted that the Court had no jurisdiction, in a petition under s 92, to inquire into whether a person's name was or was not on the roll by reason of their presence or absence from a constituency. In doing so he relied on s 96(3) which, in the terms in which it was enacted, appears to support his proposition.

[13] In his statement of reasons for a judgment issued on 20 September 2022,[3] Hugh Williams CJ rejected Mr Williams' protest to jurisdiction. Relying on the judgments of the Court of Appeal in *Puna v Woonton*[4] and *Wigmore v Matapo*[5] in declaring that s 96(3) of the Act is unconstitutional, the Chief Justice held that the Court was not prohibited from inquiring into the eligibility to vote of any person whose name is on the roll for the Titikaveka constituency.

[14] The Chief Justice's decision on that point was upheld by the Court of Appeal in a judgment dated 23 November 2022[6].

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3 *Matenga v Williams* Civil Misc. 942/2022, Williams CJ, 26 September 2022.
4 *Puna v Woonton* CKCA Appeal 10/04, 14 November 2004.
5 *Wigmore v Matapo* [2005] CKCA, CA 14/2004, 19 August 2005.
6 *Williams v Matenga* [2022] CKCA, CA 1307/2022, 23 November 2022.

[15] Following the disclosure of information to Ms Matenga through the Court's discovery process and a reconsideration of the merits of her claims, Ms Matenga confined her challenge to only four of the votes cast by registered electors on grounds discussed more fully below.

The relevant provisions of the Constitution

[16] I draw on the judgment of the Court of Appeal in *Williams v Matenga* for an account of the provisions of the Constitution and the Act that are relevant to the issues raised by the petition.[7]

[17] The Constitution of the Cook Islands was originally enacted by the Parliament of New Zealand in the Cook Islands Constitution Act 1964. By s 4 of the New Zealand Act, the Constitution is "the supreme law of the Cook Islands".

[18] The following are the relevant provisions of the Constitution:

> **27. The Parliament of the Cook Islands -**
> (1) There shall be a sovereign Parliament for the Cook Islands, to be called the Parliament of the Cook Islands.
>
> (2) Parliament shall consist of [24] members, to be elected by secret ballot under a system of universal suffrage by the electors of the following islands or groups of islands or areas and in the following numbers:-
> ...
>
> (j) The Island of Rarotonga and the Island of Palmerston, 10 members, being 1 member for each of the 10 constituencies together comprising those islands, having the names and boundaries set out in Part II of the First Schedule to this Constitution;
>
> ...
>
> (3) Subject to this Article and Articles 28 [and 28B] hereof, the qualifications and disqualification of electors and candidates, the mode of electing members of Parliament, and the terms and conditions of their membership shall be as prescribed by Act.
>
> **28. Qualification of electors -**
> (1) No person shall be qualified to be an elector for the election of a Member of Parliament, unless:
>
> (a) The person is a Cook Islander (as defined in an Act prescribing the qualifications of electors), a New Zealand citizen or has the status of a permanent resident of the Cook Islands (as provided for by Article 76A); and

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7 *Williams v Matenga*, above n 6, at [9]-[17].

(b) The person has at some time resided continuously in the Cook Islands for a period of not less than 12 months.

(2) A person who meets the qualifications imposed by subclause (1) (or re-qualifies under subclause (3)) is disqualified from being an elector for the election of a member of Parliament if the person is subsequently absent from the Cook Islands for a continuous period of 3 months or more.

(3) A person disqualified under subsection (2) shall re-qualify to be an elector for the election of a Member of Parliament if the person returns to the Cook Islands and at any time thereafter remains in the Cook Islands for a continuous period of not less than 3 months.

(4) The following shall not be regarded or treated as a period of absence from the Cook Islands for the purposes of subclause (2):

(a) Any continuous period not exceeding 4 years spent by a person outside the Cook Islands for the purpose of -

(i) Receiving education, technical training, or technical instruction; or

(ii) Receiving medical treatment;

(b) Any period spent by a person outside the Cook Islands as –

(i) a member of a Cook Islands diplomatic or consular mission; or

(ii) a spouse, partner, or member of the household of a person referred to in subparagraph (i) of this paragraph.

(5) Nothing in this Article limits the provisions of any law prescribing additional qualifications to be (or additional disqualifications from being) an elector for the election of a member of Parliament, insofar as the law is not inconsistent with any provision of this Constitution.

…

39. Power to make laws -

(1) Subject to the provisions of this Constitution, Parliament may make laws (to be known as Acts) for the peace, order, and good government of the Cook Islands.

(2) The powers of Parliament shall extend to the making of laws having extraterritorial operation.

(3) Without limiting the generality of the power conferred by subclause (1) of this Article to make laws for the peace, order, and good government of the Cook Islands, that power shall, subject to the provisions of this Constitution, include the repeal or revocation or amendment or modification or extension, in relation to the Cook Islands, of any law in force in the Cook Islands.

(4) Except to the extent to which it is inconsistent with this Constitution, no Act and no provision of any Act shall be deemed to be invalid solely on the ground that it is inconsistent with any law in force in the Cook Islands.

(5) For the avoidance of doubt, it is hereby declared that the power conferred on the Legislative Assembly of the Cook Islands by Article 39 of this Constitution (as originally enacted) to make laws for the peace, order, and good government of the Cook Islands always conferred on that Assembly power to make laws, notwithstanding anything in Article 46 of this

> Constitution (as originally enacted), declaring that any specified Act of the Parliament of New Zealand or any regulations, rules, or order under any Act of that Parliament should extend to the Cook Islands as part of the law of the Cook Islands.

[19] Article 65 requires every enactment to be construed and applied so as not to abrogate, abridge, or infringe any of the fundamental rights or freedoms recognised by art 64.

[20] Several features of these provisions in the Constitution are significant:

(a) Article 27(2) establishes "a system of universal suffrage" which means the right to vote is given to all citizens regardless of wealth, income, gender, social status, race, ethnicity, or political stance. Inherent in a system of universal suffrage is the fundamental principle "one person one vote".

(b) Article 27(2) implements the system of universal suffrage by describing constituencies with reference to the various islands or group of islands or areas making up the Cook Islands as well as stipulating the number of members of Parliament to be elected by each constituency. Obviously, under the principle of "one person one vote" an elector may vote only in one constituency. Article 27, therefore, precludes the electors of one constituency from electing a member of another constituency.[8]

(c) Subject to arts 27, 28 and 28B, the qualifications and disqualification of electors and candidates, and the mode of electing members of Parliament are left by the Constitution to be prescribed by Act of Parliament.[9]

(d) The qualifications for electors prescribed by art 28 are based on stipulated residential requirements which art 28(5) recognises will be supplemented by statutory provisions not inconsistent with the provisions of the Constitution.

(e) The provisions of art 39(1) and (4) make it clear that the power of the Cook Islands Parliament to make laws is subject to the provisions of the Constitution.

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8 *Puna v Woonton*, above n 4, at [20].

9 Constitution of the Cook Islands, art 27(3).

The relevant provisions of the Electoral Act 2004

[21] In addition to the sections set out at [10] above, the following are the relevant provisions of the Electoral Act:

> 7. Qualifications for registration of electors - (1) A person shall be qualified to be registered as an elector of a constituency if that person -
>
> (a) is a Cook Islander or a New Zealander citizen, or has the status of a permanent resident of the Cook Islands;
> (b) has at some period actually resided continuously in the Cook Islands for not less than 12 months;
> (c) is 18 years of age or over;
> (d) has been actually resident in the Cook Islands throughout the period of 3 months immediately residing that person's application for enrolment as an elector;
> (e) has not been convicted of any corrupt practice or any offence punishable by death, or imprisonment for a term of 1 year or more unless in each case that person has received a free pardon or has undergone the sentence or punishment to which that person was adjudged;
> (f) is not of unsound mind.
>
> (2) the constituency for which a person shall be entitled to be enrolled and to vote as an elector shall be the last constituency in which that person has actually resided continuously for 3 months or more.
>
> (3) Every person who at the time of first making application for registration or who having become disqualified pursuant to subsection (4) requalifies under subsection (5) to be an elector of a constituency but has not actually resided in any one such constituency for a continuous period of three months shall be entitled to be registered in the constituency in which that person spent the greatest part of his or her time during the period of three months immediately preceding the date of his or her application for registration.
>
> (4) a person who meets the qualifications imposed by subsection (1) or who requalifies under subsection (5), is disqualified from being an elector, or as an elector for a particular constituency if the person is subsequently absent from the Cook Islands or from the particular constituency for a continuous period exceeding 3 months.
>
> …
>
> 13. Compulsory registration of electors - (1) Every person qualified to be registered as an elector for any constituency shall make application in Form 1 to any Registrar for registration as an elector –
>
> (a) within one month after the date on which he or she first becomes qualified to be registered as an elector; or
> (b) within one month after the date on which, following a change in his or her place of actual residence from one constituency to another, he or she first becomes qualified to be registered as an elector of that other constituency.
>
> (2) No person shall be entitled to be registered as an elector on more than one electoral roll.
>
> (3) Every person commits an offence under this section who, being required by this section to apply for registration as an elector during any period, knowingly and wilfully fails to do so.

(4) Every person who commits an offence against this section shall be liable on conviction to a fine not exceeding $100 on a first conviction, and to a fine not exceeding $200 on any subsequent conviction:

Provided that no person who applies for registration as an elector shall be liable to prosecution for an earlier failure to apply for registration as an elector pursuant to the provisions of this section.

…

15. Closing and printing of rolls - (1) For the purposes of a general election -

(a) the main rolls shall be closed 7 days following the date on which the Queen's Representative publishes notice of the general election pursuant to section 30(1)(a);
(b) the supplementary rolls shall open on the day following the closing of the main rolls and shall be closed 14 days thereafter.

(2) For the purposes of a by-election -

(a) the main rolls shall be closed 7 days following the date on which the Chief Electoral Officer publishes notice of the by-election pursuant to section 105(1)(b);
(b) the supplementary rolls shall open on the day following the closing of the main rolls and shall be closed 14 days thereafter.

(3) The Chief Registrar of Electors shall cause to be printed a copy of the main roll for each constituency at least once in each year and at such other times as he or she considers necessary.

…

24. Objection by an elector - (1) Any elector may, subject to subsection (2), at any time object to the name of an elector whose name appears on the same roll, on the ground that he or she is not qualified to be registered as an elector, or is not qualified to be registered on the roll on which his or her name appears.

(2) No objection may be made by an elector in respect of any main roll or supplementary roll, later than 7 days after the closing of that roll for a general election or a by-election.

(3) Every objection shall -

(a) be made in writing to the Registrar for the constituency affected; and
(b) specify –
    (i) the name and address of the objector and of the elector objected to; and
    (ii) the grounds and reasons for the objection.

(4) Where the Registrar considers the grounds and reasons set out in the objection frivolous, vexatious or insufficient for the purposes of informing the Registrar of the grounds and reasons for the objection, the Registrar shall reject the objection.

(5) Every objector upon request shall be entitled on the payment of any charges, to receive from the Registrar in charge, a copy of the application for registration of the elector objected to, together with any reply which the person objected to may have filed with the Registrar, in answer to the objection.

…

26. Objection by Registrar - (1) The Registrar for any constituency may, subject to subsection (2), at any time object to the name of any elector being on the roll for the constituency of which he or she is in charge on the grounds that the elector is not qualified to be registered as an elector for that constituency.

(2) No objection may be made by the Registrar in respect of any main roll or supplementary roll, later than 7 days after the closing of that roll for a general election or a by-election.

(3) Where the Registrar raises any objection under subsection (1), the Registrar shall forthwith give to the elector objected to, notice in writing of the objection and the grounds and reasons for the objection. For the purposes of this section, notice shall be deemed to have been given if the Registrar delivers such notice addressed to an elector objected to, at that elector's last known address in the constituency.

(4) The notice issued by the Registrar under subsection (3) shall also inform the elector objected to, that -

(a) he or she may forward to the Registrar a statement signed by him or her giving reasons why his or her name should be retained on the roll; and
(b) his or her name will be retained on the roll if he or she within 7 days provides the Registrar with evidence that satisfies the Registrar that his or her name should be retained on the roll; and
(c) if he or she fails to forward a statement to the Registrar within seven days after the day on which that notice was served on him or her, or if the statement forwarded to the Registrar fails to satisfy the Registrar that he or she should be retained on the roll, the Registrar is empowered pursuant to section 27 to remove his or her name from the roll.

…

28. Appeal against Registrar's decision to Court - (1) If an objector or the elector objected against is dissatisfied with a decision of the Registrar made pursuant to sections 20, 24 or 27, either the objector or the elector may within 7 days of the Registrar's decision being made, appeal to a Judge of the Court for a review of that decision.

(2) The Court may, after conducting such review either -

(a) retain on the roll the name of the elector objected to; or
(b) remove from the roll the name of the elector objected to; or
(c) if satisfied that the person objected to is qualified to be on some other roll, transfer to that other roll through the Chief Registrar of Electors, the name of the elector objected to; or
(d) make such amendment to any roll as may be necessary to give effect to the determination.

(3) The determination of the Court on any appeal to which this section applies shall, subject to section 102(2), be final and conclusive and without further appeal.

[22] Several features of these statutory provisions are significant:

(a) As permitted by art 28(5) of the Constitution, the provisions of s 7 prescribing the qualifications for the registration of electors supplement the provisions of art 28 by adding the further requirements in paragraphs (c) to (f) to subsection (1); in subsections (2) and (3) and in paragraph (c) to subsection (6), thereby expanding the factors listed in art 28(1) and (4) respectively.

(b) The "one person one vote" principle is reflected in s 13(2) which precludes an elector from being registered on more than one electoral roll.

(c) Section 7(2) of the Act determines who are the electors of each constituency by providing that the constituency for which a person shall be entitled to be enrolled and vote as an elector shall be the last constituency in which the person has actually resided continuously for three months or more.

(d) Subsections (3), (4) and (5) of s 7 make it clear that an elector must attach to "a particular constituency".[10]

(e) A regime for objecting to the registration of an elector on a roll is created by ss 24-28. It permits objections by other electors on the same roll and the Registrar of Electors on the ground that the elector is not qualified to be registered as an elector or registered on the roll where his or her name appears.

(f) An objector or elector dissatisfied with a Registrar's registration decision may appeal to the High Court under s 28.

Relevant electoral law principles

[23] Having regard to the provisions of the Constitution and the Act discussed above, four principles of Cook Islands electoral law are relevant to this case:

(a) An elector must satisfy a residency requirement under the Constitution before being eligible to register and cast a valid vote.

(b) An elector may lose their qualification to vote by being absent from the Cook Islands or from their constituency for a continuous period exceeding three months.

(c) A disqualified elector may re-qualify if they return and subsequently "actually" reside in the Cook Islands or the constituency for a continuous period of not less than three months.

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10 *Puna v Woonton*, above n 4, at [22].

(d) In certain exceptional circumstances, a period of absence from a constituency or the Cook Islands may be deemed not to count as a period of absence that could lead to disqualification.

[24] The exceptional circumstances claimed on behalf of two of the electors concern periods during which they said they were absent from the Cook Islands (Tuaine Papatua) or from their constituency (Aere Vainu) "for the purpose of … receiving medical treatment".[11]

Principles of interpretation

[25] Before turning to consider the arguments raised regarding the four challenged electors, I repeat the essential principles for the interpretation and application of an Article in the Constitution. The Court should adopt a generous interpretation in order to give individuals the full measure of the fundamental rights and freedoms conferred by the Constitution, subject only to such limitations as are necessary to ensure that there is no prejudice to the public interest.[12] I recognise that the right to vote is not included in the Constitution as one of the fundamental human rights and freedoms listed in art 64, except to the extent that its importance is underpinned by the inclusion in the list of freedom of thought, conscience, and religion and freedom of speech and expression.[13] The right to vote, however, is conferred by the Constitution in art 27(2). In my view, the Court should not lightly interpret any provision of the Constitution or the Act in such a way as to abrogate the system of universal suffrage established by art 27(2).[14] Such an approach is consistent with the requirement of art 65(2) that every enactment shall "receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the enactment or provision thereof according to its true intent, meaning, and spirit."

[26] The Court, however, should not indulge in judicial law making; it must give primary attention to the words used, although it should guard against interpreting them in a mechanical or pedantic way.[15] The social and historical context in which the Constitution is to be understood must be considered.[16]

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11 Electoral Act 2004, s 7(6)(a)(ii).
12 *Minister of Home Affairs v Fisher* [1980] AC 319 (PC), at 328-9, per Lord Wilberforce.
13 Articles 64(1)(d) and (e).
14 *Ngaronoa v Attorney-General* [2018] NZSC 123, at [114], per Elias CJ.
15 *Human Rights Protection Party v Masipa'u* [2021] WSSC 79, at [37].
16 *Electoral Commissioner v FAST Party* [2021] WSCA 2 at [17]; *Human Rights Protection Party v Masipa'u*, above n 15, at [40].

[27] When a court is considering whether a statutory provision is consistent with the Constitution it should, if possible, interpret a statute so that it does not conflict with any constitutional limitations. In the event of potential inconsistency, legislation should, where possible, be "read down" to comply with constitutional requirements.[17]

Burden of proof

[28] I accepted the submissions of Mr Mason, not disputed by counsel for the respondents, that the ordinary rule concerning the burden of proof applies and that the person who makes an assertion of ineligibility has the burden of establishing it.[18] If, however, the petitioner has established what appears on the face of it to be ineligibility to vote, the onus then falls on the elector, or the person defending the eligibility to vote, to establish that the elector falls within one of the exceptions set out in art 28(4) of the Constitution and/or (if it applies) s 7(6) of the Act.[19]

[29] I now discuss the nature of the challenges made about the eligibility of the four challenged electors.

Ina Bishop

[30] It was common ground that Ina Bishop:

(a) is a Cook Islander;

(b) at some time resided continuously in the Cook Islands for not less than 12 months;

(c) departed the Cook Islands on 14 January 2022; and

(d) returned to the Cook Islands on 20 June 2022.

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17 *Arorangi Timberland Ltd v Minister of the Cook Islands National Superannuation Fund* [2016] UKPC 32, at [29]-[30].

18 *Wigmore v Matapo* [2005] CKCA CA No. 74/2004, at [105].

19 *Tangatapoto v Vavia* [2015] CKCA CA No. 1/15, at [24].

[31] It was also accepted that Ms Bishop had qualified to be an elector under art 28(1)(a) and (b) of the Constitution, but the petitioner argued Ms Bishop became disqualified under art 28(2) because she was absent from the Cook Islands for a continuous period of three months or more between January and June 2022.

[32] No evidence was put before the court to explain Ms Bishop's absence during that period and Mr Hikaka did not dispute that the petitioner had established her disqualification. Mr Hikaka accepted also that it was not open to Mr Williams to argue that Ms Bishop had re-qualified under art 28(3) by returning to the Cook Islands in June 2022, because, at the date of the election on 1 August 2022, she had not remained in the Cook Islands for a continuous period of three months or more.

[33] I determined, therefore, that Ms Bishop was not qualified to enrol as an elector in the election and that her vote was invalid.

Brendan Platt

[34] Brendan Platt is a New Zealand citizen who, on Election Day 2022, was an employee of the Cook Islands Ministry of Education teaching at Tereora College. It was common ground that Mr Platt arrived in the Cook Islands on 17 May 2021, pursuant to a 12-month entry permit, and took up his duties at the College. Mr Platt remained in the Cook Islands until 17 April 2022 when he departed for a short holiday. He returned to the Cook Islands nine days later and remained in the Cook Islands from 27 April 2022 until Election Day.

[35] Mr Mason argued that the undisputed facts established that Mr Platt had not resided continuously in the Cook Islands for a period of 12 months at any time and that, because he could not satisfy the residence requirement of art 28(b) of the Constitution, he had failed to obtain qualification as an elector. The sole question regarding the challenge to Mr Platt's eligibility to vote, therefore, was whether Mr Williams had established on a balance of probabilities that Mr Platt had resided continuously in the Cook Islands for 12 months, despite having been absent on holiday for nine days.

[36] The issue of continuous residence under the electoral rules is one that has troubled the courts from time to time.[20] *Rasmussen v John*[21] concerned the eligibility of electors to vote in a particular constituency. A travelling party of Cook Islanders who resided in Australia but who had qualified as electors under art 28(1)(b), having at some time resided continuously in the Cook Islands for a period of not less than 12 months, arrived in the Cook Islands in November 2013 and made their way to the island of Penrhyn. They had intended to depart Penrhyn in March 2014 but complications with the vessel that was meant to return them to Rarotonga, from where they could return to Australia, meant they were delayed. They were still on the island of Penrhyn when a "snap election" was held on 17 April 2014; they enrolled and voted.

[37] The question before the High Court was whether the challenged electors, whose homes were undeniably in Australia, could be said to have "been actually resident in the Cook Islands throughout the period of 3 months immediately preceding" their applications for enrolment as electors.[22] Weston CJ accepted the submission of the Solicitor-General that examining compliance with the requirement that an eligible elector must have "actually" resided continuously in the Cook Islands called for a geo-physical test requiring consideration of the elector's physical location.

[38] The Chief Justice referred to three reasons for accepting that submission:

(a) A finding that the eligibility criterion of actual residence focused on physical presence was consistent with the requirement in art 28(3) that a disqualified elector is re-qualified if the elector "remains" continuously after returning from a period of absence.[23]

(b) The reference in art 28 in the 1980-1981 version of the Constitution to an elector's "place of abode" was repealed in 2004, indicating Parliament's intention to move the focus away from the location of the elector's home.[24]

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20 See, for example, *Matapo v Wigmore* [2006] CKHC Misc. No. 88/06; *Ioane v Kake* [2010] CKHC Misc. No. 112/2010; *Tuariki v Beer* [2014] CKHC Misc. No. 6/2014; *Rasmussen v John* [2014] CKHC Misc. No. 40/2014 and *Rasmussen v John* [2014] CKCA Misc. No. 9/2014.

21 *Rasmussen v John* [2014] CKHC Misc. No. 40/2014.

22 Electoral Act 2004, ss 7(1)(d) and 7(2).

23 *Rasmussen v John*, above n 21, at [30].

24 At [31].

(c) Section 7(3) provides that, in the case of uncertainty of constituency, the constituency in which the person has spent the greatest part of the time during the period of three months is to prevail. This emphasises that the Court's concern is with the period of time spent in the electoral constituency.[25]

[39] On appeal from the judgment of the Chief Justice,[26] the Court of Appeal held that the issue is whether the words "actually resided" and "actually resident" in s 7 of the Act requires a "geo-physical" test, or whether they require the "actual home" of the elector to be in the constituency for the required period. When applied to that case, the issue was whether Cook Islanders who were then living in Australia were qualified to vote because they were physically staying in the Penrhyn electorate at the relevant time.[27]

[40] At all times the group lived in Australia (as the ordinary use of language would have it) but they had remained in Penrhyn for over three months. Nineteen members of the group registered as electors of the Penrhyn constituency following the announcement of the "snap election".[28]

[41] The Court of Appeal upheld the view of the Chief Justice about the nature of the test to be applied, essentially for the reasons given by the High Court. The Court of Appeal said:

> [21] While it is accepted that the use of different words in the qualification requirement of art 28(1)(b) and s 7(1)(b) could evidence that each qualifying requirement is different, this is not necessarily so. We accept the submissions of the First Respondent that the Appellant's interpretation would make ss 7(1)(b) and 7(5) inconsistent with art 28(1)(b). Article 28(1) contains the two essential criteria for qua1ification. One of those criteria is a period of continuous physical residence. If eligibility is lost under this provision it is regained under art 28(3) by returning to the Cook Islands and remaining there for 3 months. Once regained, it may be lost because of factors contained in subsections 7(1)(c), (e) and (f). These provisions are not inconsistent with the Constitutional residency qualification. An interpretation of s 7(5) interpreting "actually resides" as "place of abode" is inconsistent.
>
> [22] The legislative history supports the geo-physical interpretation. In the original constitution, the term used was ordinarily resident in the Cook Islands. The Constitution was amended in 1965 to reduce the period of residency required to allow Sir Albert Henry to stand as a candidate. There was, in both constitutions, a provision which deemed a person to be ordinarily resident if having been actually residing in the Cook Islands

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25 At [32].
26 *Rasmussen v John* [2014] CKCA Misc. No. 9/2014.
27 At [6].
28 At [9].

and living outside the Cook Islands at the time the person "has, and has had ever since he left the Cook Islands an intention to return and reside therein indefinitely."

[23] This constitutional provision allowed the "fly-in" votes controversy during the general election of 1978. The deeming provisions allowed voters to be flown in and registered as voters. Consequently, the Constitution was amended in 1980-81. This amendment based the electoral qualification on residency and included a definition of "to reside." It removed the right of Cook Islanders living overseas to vote, but in return created an Overseas Constituency for those persons.

[24] As a result of pressure for potential reform a Political Reform Commission was established which reported in 1998. The Commission in its report noted the reality of more Cook Islanders living overseas than residing in the Cook Islands with few of them having the intention to return. It recommended the abolition of the Overseas Constituency, the repeal of the definition of "to reside" and that Cook Islanders who had been abroad for more than 3 months should qualify again 3 months after their return.

[25] The definition of "to reside" was deleted from the Constitution as was the Overseas Constituency. The draft art 28, as suggested by the Commission, included a provision that a requirement for election was that the person "has been resident in the Cook Islands throughout the period of three months immediately preceding his application for enrolment as an elector." This provision was not included in the Constitution when art 28, in its present form, was included. Instead the Legislature used the word "remains" in art 28(3). There was no longer a definition of "to reside".

[26] This history suggests that because of the transient nature of the Cook Islanders) actual presence in the Cook Islands was a requirement for qualifying as an elector. Once physically here the requirement is to remain for three months. There is no suggestion in this history that there is a requirement to have one's permanent home in the Cook Islands. The history supports the interpretation of the provision in the context given above.

[27] The Appellants' position is that the legislative history of art 28 is less relevant than the legislative history of s 7. The provisions of s 7 cannot be inconsistent with the provisions of art 28(1). Under art 28(3), a qualification is regained on a return to the Cook Islands and the person remaining in the Cook Islands for a continuous period of not less than three months. The minimum physical presence required is for a period of three months. As already noted, to construe the s 7 requirement as being "actual abode" is inconsistent with art 28(1). A section determining the actual constituency in which an elector can vote cannot, in this Court's view, disenfranchise an elector.

[28] In summary, art 28 gives a constitutional right to be an elector based on actual presence. If lost, it is regained by actual presence. This is a right which cannot be lost by an Act changing that test.

Discussion

[42] Applying the concept of residence as it might ordinarily be understood, Mr Platt might reasonably be said to have been residing in the Cook Islands from the time he arrived in May 2021 until he departed on holiday in mid-April 2022, because he was both living and working

in the Cook Islands during that time. He was absent for only a short holiday of just over a week before returning to the Cook Islands to resume living and working here thereafter. It would be entirely consistent with ordinary parlance for Mr Platt to be said to have been a resident of the Cook Islands throughout the whole period.

[43] The Court of Appeal's judgment in the Penrhyn case is directly on point in this case, however, and I am bound by it regarding the challenge to Mr Platt's status as an elector. The statutory context calls for a meaning that differs from that which might apply in ordinary usage. As well as respectfully agreeing with the Court's reasoning in *Rasmussen v John*, I attach significance to the requirement in s 7(1)(b) for an elector who is qualified to be registered to have "*actually*" resided continuously in the Cook Islands for the respective qualifying periods. Although the use of the word "actually" might be regarded as redundant, in that it adds nothing to the ordinary meanings of "resided" and "resident", I infer that it was used by Parliament in the legislative context to emphasise the need for a physical presence to qualify, or re-qualify, as an elector. That is understandable in light of the history of the legislative changes in 1980-81, as discussed by the Court of Appeal at [21]-[26] of the judgment.

[44] The requirements of the Constitution in art 28 do not require "actual" residency. The addition of a requirement for "actual" residency in the corresponding criteria in s 7 of the Act, therefore, might be considered arguably inconsistent with the Constitution. Article 28(5), however, with expressly permits Parliament to prescribe additional qualifications to be, or additional disqualifications from being, an elector for the election of a member of Parliament so long as the law is not inconsistent with any provision of the Constitution. It is clear that the Court of Appeal in *Rasmussen v John* did not consider a requirement to be physically present in order to qualify as an elector to be an additional qualification or ground for disqualification that is inconsistent with the constitutional requirements in art 28.

[45] For these reasons, I was satisfied that, although the outcome was unfortunate for Mr Platt, his nine-day holiday disqualified him from being eligible to enrol as an elector and that his vote was invalid.

Tuaine Papatua

[46] Mr Papatua is a Cook Islander who had lived in Melbourne for 20 years prior to returning to the Cook Islands in 2016. He has lived in Titikaveka since then. His wife had a

serious motor accident on Rarotonga and was transferred to Auckland, in a coma, by medical evacuation on 7 February 2022. Mr Papatua travelled to Auckland on 9 February 2022 to be with her. He was the accompanying family member under the relevant Ministry of Health policy and the person making decisions for his wife's care. Mrs Papatua died on 9 March 2022; she was cremated in New Zealand.

[47] About three weeks later (around 30 or 31 March 2022), Mr Papatua took his wife's ashes with him to Melbourne where he spent time with his children. The evidence did not reveal how long Mr Papatua remained in Melbourne, but it did establish that he returned to the Cook Islands from New Zealand on 29 May 2022. There was no evidence about whether Mr Papatua spent any time in New Zealand after his trip to Melbourne and prior to returning to the Cook Islands, or whether he was merely a transit passenger on a flight that originated in Melbourne. Mr Hikaka invited me to take judicial notice of the post-COVID19 lockdown situation regarding commercial flights between Australia and the Cook Islands at that time, but I declined to do so. Evidence could have been called to establish what had occurred. In any event, I decided the point was not relevant, for reasons that appear below.

[48] It was not disputed that more than three months elapsed between 9 February 2022 when Mr Papatua departed the Cook Islands for Auckland and 29 May 2022 when he returned. Nor is it disputed that less than three months elapsed between his return to the Cook Islands and election day on 1 August 2022.

[49] For the petitioner, Mr Mason argued that Mr Papatua was not able to claim any exemption from the residency requirements on the grounds that either his wife or he were receiving medical treatment during any part of the time he was absent from the Cook Islands. Accordingly, in counsel's submission, Mr Papatua was disqualified from being an elector because he had been absent from the Cook Islands and from the Titikaveka constituency for a continuous period exceeding three months.

[50] It was not suggested that, in arguing that he was not continuously absent from the Cook Islands for electoral purposes, Mr Papatua could take advantage of the period he spent in New Zealand caring for his wife while she was receiving treatment up to the date of her unfortunate death. It was argued on behalf of Mr Williams, however, that Mr Papatua was entitled to rely on the medical exemption in s 7(6)(a)(i) on the grounds that he was receiving medical treatment in Melbourne for the period he spent there.

[51] There was no evidence that Mr Papatua received any recognised form of medical treatment from a registered medical practitioner, a psychologist or a counsellor. But Mr Papatua's evidence was that he was "devastated" by his wife's passing and that, about three weeks after her cremation, he took his wife's ashes to Melbourne to be with their children who could not go to New Zealand. He said:

> I also needed to be with them to help my recovery from my wife's sudden and shocking death. I was grieving and believed that being with my children would help my recovery from grief. Though I am still sad after my wife's death, being with my children and us all supporting each other has helped my recovery from her death.

[52] Mr Mason argued that, in the absence of evidence of any form of medical or specialist intervention, it was not possible to justify a claim that, in spending time with his children in Melbourne, Mr Papatua was receiving medical treatment.

[53] As well, Mr Mason submitted that Mr Papatua's affidavit did not disclose the period of time he actually spent in Melbourne and that the Court could not reasonably infer that it was for the whole of the period from the beginning of April 2022 until Mr Papatua's return to the Cook Islands on 29 May 2022. That being the case, Mr Mason argued, even if it was held that Mr Papatua was "receiving medical treatment" during the time he was in Melbourne, the evidence failed to establish the relevant period to be taken into account.

[54] The latter submission, however, overlooks the point that a disqualifying period of absence from the Cook Islands under art 28(2) of the Constitution or s 7(4) of the Act must be "a continuous period" of longer than three months. If the period spent in Melbourne was for the purpose of receiving medical treatment, even if the period was only a few days, the continuity of any potentially disqualifying absence immediately following Mr Papatua's departure from the Cook Islands would be interrupted. The period of absence spent in New Zealand between 9 February 2022 and 30 March 2022 was less than three months, and the remaining period of absence until Mr Papatua's return to the Cook Islands on 29 May 2022 was similarly less than three months.[29]

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[29] Counsel did not address a potential alternative argument that the periods of absence were not disqualifying because each would amount to an "occasional absence for any purpose for a period not exceeding three months": Electoral Act 2004, s 7(6)(c).

[55] The sole question regarding Mr Papatua's eligibility, therefore, was whether the time he spent in Melbourne with his children was a period during which he was "receiving medical treatment" as that term is used in art 28(4)(a)(ii) of the Constitution and s 7(6)(a)(ii) of the Act.

[56] I return to that point below, but it is convenient to first address the circumstances and arguments concerning the eligibility of Aere Vainu.

Aere Vainu

[57] Ms Vainu is a Cook Islander who has lived in Titikaveka for over 33 years. In 2021, she witnessed a tragic accident in which her great-grandson was killed by a passing car, in front of her home. She said:

> I miss my great-grandson every day and still to this day I cry for him. When he passed, I felt I had passed too. I cried and mourned for my boy every day. Though I knew I needed to be strong for my children, I couldn't. It was my husband who carried our family, he was the 'rock' for my family because I couldn't. I was struggling to hold back my grief for my boy, I cried all the time and my husband knew something was wrong.

[58] In late 2021, Ms Vainu was seen by a respected consultant clinical psychologist, Dr Evangelene Daniela-Wong, and members of the mental health services team at the Cook Islands Ministry of Health Te Marae Ora. Dr Daniela-Wong confirmed that Ms Vainu was diagnosed with post-traumatic stress disorder and severe grief. It was recommended to Ms Vainu as part of her treatment that she should spend time in Mangaia, which is her birthplace; her "enua". In Dr Daniela-Wong's view, Ms Vainu's return to Mangaia was largely to avoid explicit triggers of how her great-grandson or "moko" passed away, until she was better able to cope with them. Given that the accident had occurred in front of her home, Dr Daniela-Wong considered that, for Ms Vainu, remaining in that place was more likely to provide an environment in which the underlying trauma might be triggered and the recovery of her mental health made more difficult. She said minimising matters that trigger memories (or the re-living of) the underlying trauma that cause mental health issues can be effective in helping treatment of and recovery from those issues.

[59] Ms Vainu travelled to Mangaia on 21 October 2021 and remained there until she returned to Titikaveka on 18 May 2022, less than three months prior to the election on 1 August 2022 and voted for a candidate in the Titikaveka constituency.

[60] Mr Mason argued on behalf of Ms Matenga that, although Ms Vainu had qualified to vote under art 28(1) and s 7(1), she was actually residing continuously in Mangaia for the period of more than three months prior to the election and should have cast her vote for a candidate standing in that constituency. He submitted that, in terms of s 7(4) of the Act, she was physically absent from the constituency in respect of which she purported to vote, rendering her vote invalid.

[61] It was submitted on behalf of Mr Williams, however, that the period of absence from Titikaveka during which Ms Vainu was living in Mangaia should not be regarded or treated as a disqualifying period of absence from the Titikaveka constituency, because she was in Mangaia for the purpose of receiving medical treatment: art 28(4)(a)(ii) and s 7(6)(a)(ii).

"The purpose of … receiving medical treatment"

[62] The expression "receiving medical treatment" is not defined in either the Constitution or the Act. On behalf of Ms Matenga, Mr Mason argued for a conventional, plain English meaning.

[63] He submitted, first, that the principles described by the Court of Appeal in *Tangatapoto v Vavia*[30] should be applied. They were not disputed by counsel for the respondents, and I adopt them accordingly. In summary:

(a) The onus is on the proponent to show that there was a continuous period of absence for the purpose of receiving medical treatment.[31]

(b) The purpose is solely that of the elector.[32]

(c) "Purpose" is relevantly defined in the Oxford dictionary as "the reason for which something is done".[33] What matters is the state of mind of the elector during the relevant absence. The actual physical condition of the elector is not the test; the question is ultimately subjective.[34]

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30 *Tangatapoto Tuakeu v Vavia Tangata* [2015] CKCA CA No. 1/15, at [22]-[33].
31 At [24].
32 At [25].
33 At [26]; *Oxford Dictionary of English* (AUT, 2nd ed, revised); *R v Wentworth* [1993] 2 NZLR 450, at 457.
34 *Tangatapoto Tuakeu v Vavia Tangata*, above n 30, at [26].

(d) A court is not bound to accept an elector's evidence as to the purpose of his or her absence. In deciding whether to believe the elector, the Court can take into account the likelihood that a rational person would have left the constituency, or remained absent from it, for purpose of receiving medical treatment in the circumstances faced by the elector. On the other hand, the court must also bear in mind that not all people think knowledgeably or rationally about their own need for medical treatment.[35]

(e) There must be a causal connection between the medical purpose and the absence. A "but for test" may be applied: would the absence have occurred if the elector had not had the purpose of receiving medical treatment? Where the absence has more than one purpose, the receipt of medical treatment must be the principal one.[36]

(f) Absence for the principal purpose of receiving medical treatment can begin after an elector has already left his or her home constituency for some other original purpose. The same can apply in reverse if an elector leaves for the purpose of receiving medical treatment but then stays away for some other purpose.[37]

"Medical treatment"

[64] Mr Mason then addressed the meaning of the expression "medical treatment". Relying on the *Concise Oxford Dictionary of Current English*,[38] he extracted definitions which focused on the science of medicine in general; "treatment" being the application of medical care or attention to a patient and "science" being a branch of knowledge conducted on objective principles involving the systematised observation and experiment with phenomena.

[65] He argued that qualifying medical treatment must have a scientific basis; that is, treatment based on knowledge and experience gathered over time; a qualified third person who administers care or attention to the person; and care or attention that must be medical (that is, based on experience and knowledge).

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35 At [27]-[29].
36 At [30].
37 At [32](e).
38 *Concise Oxford Dictionary of Current English*, 9th ed. Della Thompson, Clarendon Press, Oxford, 1995.

[66] Mr Mason submitted that a patient receives medical treatment where that person obtains advice, medicine, check-ups, care or physical applications to the body from somebody recognised to have a skill which is the product of knowledge gained over time. He suggested the Court might adopt as those coming within the category of persons providing qualifying medical treatment "health professionals" as defined in the Mental Health Act 2013 or those like them.

[67] Without resiling from his primary submissions, Mr Mason recognised that the Court may be attracted to the proposition that what might be described as traditional Cook Islands Maori medicine or "vairakau Maori" is included in the meaning of "medical treatment". He argued in the alternative, therefore, that there was at least the need for some form of intervention by a third-party practitioner of traditional medicine.

[68] For the respondents, both the Solicitor-General and Mr Hikaka disagreed with Mr Mason's propositions. They submitted that Parliament did not intend to exclude treatment in the form of vairakau Maori from the scope of the exemption and argued, furthermore, that the exemption could be claimed by an elector notwithstanding that the treatment had been self-administered, without third-party intervention.

[69] Mr Annandale's submissions focused the Court's attention on the constitutional and statutory provisions that prescribe the status of the Maori language – te reo Maori – as spoken in Rarotonga.

[70] Under s 4 of the Te Reo Maori Act 2003, Maori is an official language of the Cook Islands. An objective of the Ministry of Cultural Development is to bring about a status under s 6(1)(b) is for Maori that is equal to English in the Cook Islands.[39]

[71] The Constitution provides in art 35 that:

> (a) All debates and discussions in Parliament shall be conducted in the Maori language as spoken in Rarotonga and also in the English language;[40]

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39 Te Reo Maori Act 2003, s 6(1)(b).

40 Constitution, art 35(1).

(b) Unless Parliament resolves otherwise, every Bill introduced into Parliament and every Act shall be conducted in the Maori language as spoken in Rarotonga and also in the English language;[41] and

(c) The Standing Orders of Parliament may specify that the records of parliamentary proceedings shall be conducted in the Maori language as spoken in Rarotonga.[42]

[72] The Solicitor-General acknowledged, however, that art 35(4) provides that where there is any conflict between the Maori version and the English version of any Bill or any Act or record of Parliament, the English version shall prevail.

[73] The Maori language version of art 28(4)(a)(ii) was produced. The te reo Maori equivalent to the expression "receiving medical treatment" in the English version is:

No te kimi ravenga rapakau maki.

[74] After discussions with counsel, and to assist the Court, I called Mr Tenoa Puna to give evidence on the meaning of those words. Mr Puna is an interpreter employed at the Cook Islands Parliament who is familiar with both the Cook Islands Maori and the English languages. He said that he would translate the words in the Maori version of art 28(4)(a)(ii) into English as:

To find ways to heal the sickness.

[75] He clarified under further questioning from counsel that the word "rapakau" – meaning "to heal" – covers all forms of healing and that "maki" refers to sickness, ailments and diseases of all kinds.

[76] Mr Annandale submitted that medical treatment for which an exemption from disqualifying absence under the Act is available is not confined to western medicine dispensed by Te Marae Ora, the Ministry that provides medical and hospital services throughout the country. He referred to a publication by Dr Arthur Whistler, an ethnobotanist, which was

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41 Article 35(2).
42 Article 35(3)

produced as an exhibit and which I have considered.[43] The text discusses the practice of traditional medicine that has evolved as part of Maori custom and is widespread in Cook Islands society. Mr Annandale referred to custom and usage being acknowledged as part of the law of the Cook Islands under art 66A(3) of the Constitution and submitted that there is no contrary constitutional or legislative provision excluding the customary practice of vairakau Maori from the ambit of that provision. Moreover, the social and historical context in which art 28 is to be considered includes the widespread practice of vairakau Maori as part of the maintenance and wellbeing of Cook Islanders.[44]

[77] Further, the Solicitor-General relied on the Traditional Knowledge Act 2013 as requiring the Court to recognise vairakau Maori as a form of medical treatment for the purposes of the Constitution and the Electoral Act. The preamble to the Traditional Knowledge Act states that its purpose is to "give legal recognition to rights in the traditional knowledge of the traditional communities of the Cook Islands; … and to help those communities, and the holders of those rights, to protect those rights for the benefit of the people of the Cook Islands." The definition of traditional knowledge under s 4(b) includes:

> (ix) any cultural practice forming part of the traditional way of life of the Cook Islands people;
>
> (x) any traditional process or recipe for making or preparing any drink, food, or medicine or any substance intended to be applied to the body;
> …
>
> (xiv) any traditional religious or spiritual practice;
> …
>
> (xvi) any design, practice, process, work, or other thing that is based upon or derived from traditional knowledge of a kind described in any of subparagraphs (i) to (xv).

[78] The Crown's submissions on these points were supported by Mr Hikaka and Mr Marshall on behalf of Mr Williams.

[79] Against the backgrounds of those submissions on the law, I turn to the evidence.

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43 *Traditional Herbal Medicine in the Cook Islands*, 1985, Elsevier Publishers Island Limited.

44 *Electoral Commissioner v FAST Party* and *Human Rights Protection Party v Masipa'u*, above n 16.

Mr Ngarima George

[80] The Court had the benefit of expert evidence from Mr Ngarima George, called on behalf of Mr Williams and Mr Makiuti Tongia, who was called to give evidence on behalf of the petitioner.

[81] Mr George is a deacon of the Cook Islands Christian Church (Assembly of God) in Titikaveka and he has been a practitioner of Cook Islands traditional and customary medicine for over 60 years. There was no challenge to his expertise as an elder and expert in Maori medicine and knowledge.

[82] Mr George told the Court that he had learned the medicine traditions and practices from his family who had practiced the art of traditional medicine and passed it on to his generation and him. He continued to develop his knowledge and experience in the art and rules of traditional medicine including the use of herbs and roots, the role of traditional massage in healing, the philosophy and mana of traditional medicine, its holistic approach taking into consideration matters such as the weather, the role of family, and respect for the land and sea. He said that the principles, practices, and traditions of vairakau Maori are taught as an oral and practical tradition. He offers traditional medicine and massage at the Punanga Nui market.

[83] Mr George explained that traditional Maori medicine teaches how to help cure pain and wounds using knowledge passed down. He noted that it includes not just the use of herbs and roots and massage but also importantly spirituality and harmony in healing. He explained that vairakau Maori recognises the great importance of mental health as an essential part of a healthy person and as an essential part of the healing process. Mr George said:

> When healing from physical injuries, it is important that you have harmony within your spirit so that you can heal properly. Traditional medicine also recognises mental health and injuries to your spirit as things that require healing. The spirituality of a person is very important as everything is tied up with your spirit. In Maori, we recognise 'Mauri' and 'Vaerua' as the spirit of a person which also needs to be healthy, and healed when necessary. Mauri and Vaerua are recognised throughout the Cook Islands, although the names may change from island to island.
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> … the most important part of mental health treatment is family. One of the most important principles of Maori medicine is harmony, especially harmony within yourself. You need harmony if you want to heal. It is the family that is essential in creating harmony which people need in order to heal. Family offers their support to a person,

> offers forgiveness and unity, relieves the burden of hardship and rejection, and heals the spirit.
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> In Cook Islands Maori and in traditional medicine there is 'Turangavaevae' or 'Tango Tupuna' which is both returning to your roots and standing firm on your principles to bring harmony and release of pain or letting go of hardship. Wives often return to their parents when there are domestic issues with their husbands, children often go to their grandparents if they get too wild for their parents, people often go back to their families to share and recover from grief and pain. This all comes back to the importance of bringing harmony, moving on from pain, and bringing family together. Often this means going back to your family to seek support or forgiveness and to rest and recover. Recovery is one of the hardest parts of healing, but it is also one of the most important. If you really want to recover, you need to go back to your roots, heal your spirit, and recover your harmony. A return home to your family is one of the most powerful ways to release pain to your spirit, overcome heartache, and achieve harmony.
>
> Traditional Maori medicine recognises mental trauma, grief, and depression as things that can be healed. There are herbs that can be taken, and it can be treated to some extent through massage, but it is reflection and sharing that are most important. In Maori medicine, to heal trauma, depression, and grief you need to bring out the hardship, otherwise you are always carrying it with you. If you do not relieve your spirit of these burdens, they … just keep bringing back the pain. Once again it is the family that creates the harmony and offers the forgiveness needed to relieve a person's spirit of these burdens.

[84] Mr George said that, in his opinion, Ms Vainu's decision to travel back to her turangavaevae on Mangaia, where she had family support and was away from the site of the fatal accident, is aligned with the treatment of grief and trauma under vairakau Maori. Similarly, he said that Mr Papatua's grief after the death of his wife would be recognised under traditional Cook Islands Maori medicine as a matter that would receive medical treatment. In his opinion, Mr Papatua's decision to travel to Australia to be with his children after his wife had died, in order to recover from the grief, was aligned to that.

Mr Makiuti Tongia

[85] Mr Makiuti Tongia has a Bachelor of Arts in Sociology, Pacific History and Creative Writing from the University of the South Pacific and a Master of Arts in Ethnology and Living Museums after studying at Ohio State University in Western Kentucky University. He has been a director of the Cook Islands National Museum and in 1993 commenced a lectureship in Cook Island studies at Victoria University of Wellington. He returned to the Cook Islands in 2002 and in 2010 was appointed secretary of the Ministry of Culture. Mr Tongia is a published poet and is currently chair of The Kopapa Reo Board whose purpose is the preservation of the

Cook Islands Maori language and its dialects, and to recommend Maori words for new things, such as drones. He has a longstanding interest in the Cook Islands Maori language and in 2009 published a book called Learning Rarotonga Maori.

[86] Although he is a highly qualified linguist, Mr Tongia did not claim to be an experienced practitioner in the art of vairakau Maori. Nevertheless, Mr Tongia said his written evidence that, while Mr George has been a practitioner for many years, he did not accept that he could be distinguished in any marked way from others of the same generation such as Mr Tongia. Mr Tongia said that, when they were young, they all learned Maori medicine from their elders. Nor did he agree with Mr George that Maori medicine is concerned with mental health but instead said it was concerned with Vairua (the spirit) and physical wellbeing. He distinguished Western medicine from traditional Maori medicine by saying that whereas Western medicine looks for a solution to an ailment with the cause being only incidental to the cure, in traditional Maori medicine knowing the cause of the ailment is critical to finding the cure. For support, Mr Tongia referred to Dr Whistler's publication *Traditional and Herbal Medicine in the Cook Islands.*[45]

[87] In his evidence in chief, Mr Tongia did not dispute Mr George's claim that being with family may help people in times of grief, but he did not see that as a particular aspect of Maori medicine. He said that being with family might be relevant for some contrition or forgiveness once the cause of the problem is ascertained but he considered it was not part of Maori medicine when it was independent from the cause. He said that the desire to be with loved ones in the time of grief is simply human nature and there is nothing peculiar about that to Maori culture never mind Maori medicine.

[88] Mr Tongia then addressed the use of the word "turangavaevae" by Mr George, saying that it was not a word known in the Rarotongan Maori language. He acknowledged, however, that given the strong parallels between New Zealand Maori and the Maori language as spoken on Mr George's home island of Manihiki, Mr George might understand a term which is derived from the New Zealand Maori word "turangawaewae". Mr Tongia also challenged Mr George's reference to "tango tupuna", which refers to one's ancestry, which he did not consider to be appropriate to the circumstances.

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45 Above n 43.

[89] Under further oral examination by Mr Mason, however, Mr Tongia resiled somewhat from the position he had taken in his written brief of evidence, at least so far as he had originally indicated that he considered that the desire to be with loved ones in a time of grief was simply human nature and that there was nothing about that which was peculiar to Maori culture or Maori medicine. In his oral testimony, Mr Tongia noted that the concept of mental health in Cook Islands society was a post-contact development, referring to the increasing influence of contact with Western cultural society and, more particularly, through contact with New Zealand between 1901 and 1965. He said that prior to that contact, the Cook Islands had focussed only on physical and spiritual concepts. I observe, however, that taking a broad view of mental health would allow a degree of overlap between the kind of spirituality referred to by Mr Tongia (as evidenced by the discussion in Mr Whistler's text) and concepts of mental wellbeing more familiar in modern Western culture.

[90] In his oral evidence, Mr Tongia agreed that Ms Vainu's decision to return to Mangaia to aid her healing from the serious grief she suffered after witnessing her great-grandson's tragic death was consistent with Cook Islands custom. He said:

> In Maori she would've used the word "enua". She went back to her island of birth, to her enua. "Enua" also refers to the placenta that you bury, that the child's placenta is buried and that's what she's doing, going back to her enua in a biological sense, going back to enua in the physical sense. She's touching base with her land, with her beginning, with her origin. … It is part of the spiritual belief in traditional medicine.

[91] In reference to Mr Papatua's decision to go to Melbourne to be with his children after his wife was cremated, taking her ashes with him, Mr Tongia said that, even though Mr Papatua was not born and raised in Australia, that decision was consistent with the spiritual side of traditional healing because Mr Papatua had gone there to be with his children. I asked Mr Tongia, in the context of vairakau Maori, what were the aspects of Mr Papatua's trip to Melbourne that made it relevant to Mr Tongia's views about healing a mental health issue or problem? Mr Tongia answered that Mr Papatua had gone to his children to seek warmth and to be healed by being around people he was familiar with. I considered the answer to be relevant to both the question of mental health and to spiritual wellbeing or spiritual health.

Were Mr Papatua and Ms Vainu absent for the purpose of "receiving medical treatment"?

[92] In terms of the relief from suffering that Ms Vainu and Mr Papatua would have obtained from joining with family in order to heal from the deep-seated grief each of them was experiencing, there did not seem to me to be much difference between the concepts of vairakau Maori discussed by Mr George and Mr Tongia and the views of Dr Daniela-Wong on the Western medicine approach to the relief from post-traumatic stress disorder and severe grief.

[93] I was satisfied that, as a matter of law, vairakau Maori was intended by Parliament to be included in the term "medical treatment" when considering whether a period of absence from the Cook Islands should be treated or regarded it as a period of absence that disqualified an elector from voting or from voting in a particular constituency. My reasons for that view were these:

(a) The evidence of Mr George and Mr Tongia established that vairakau Maori is a cultural practice that forms part of the traditional way of life of the Cook Islands people. It has a spiritual element as well as traditional processes or recipes for preparing medicine, and it incorporates an approach that is based upon or derived from traditional knowledge.

(b) In its treatment of post-traumatic stress disorder or severe grief, vairakau Maori does not differ greatly from the approach recommended by Dr Daniela-Wong to Ms Vainu and adopted by her. I was satisfied that, notwithstanding the absence of any formal treatment or advice, Mr Papatua's stay in Melbourne should properly be regarded as the application of vairakau Maori principles.

(c) I infer that the legislative intention for the "medical treatment" exemption in art 28 of the Constitution and s 7 of the Act was to ensure that electors suffering from some illness or ailment requiring treatment outside the Cook Islands or the constituency in which they normally resided should not be deprived of the important right to vote in that constituency. It would be inconsistent with that intention, and contrary to recognised principles for the interpretation of provisions of the Constitution and the Electoral Act, for the Court to take a narrow view of the meaning of "medical treatment" that disenfranchised electors who were otherwise qualified to vote.

(d) The words appearing in the Maori version of art 28(4)(a)(ii) of the Constitution that are translated as referring to "ways to heal the sickness" support a broad view that recognises the inclusion of a period of rehabilitation in one's birthplace and/or in the company of one's close family as a way to heal oneself from severe grief.

(e) While I acknowledge that art 35(4) requires the Court to adopt the English version of the Constitution in the case of any conflict between that and the Maori version, Mr Puna's evidence satisfied me that there is no conflict between the two versions. In my view, the broad scope of the Maori wording informs the Court as to the legislative intention concerning the scope of the exemption.

[94] The return of Ms Vainu to Mangaia was recommended by Dr Daniela-Wong as part of the advisable treatment. I had no difficulty coming to the view that that was a form of medical treatment in terms of Western medicine, even though no medical practitioner was directly engaged in any rehabilitation process or treatment once Ms Vainu reached her birthplace. I concluded also that it was equally valid as a form of treatment in terms of vairakau Maori, as explained by both Mr George and Mr Tongia and that recovering from her grief was the sole reason for Ms Vainu's stay on Mangaia.

[95] Mr Papatua did not receive medical advice and Australia is not his birthplace, but Mr Papatua had lived in Australia for over 20 years and his children live there. I was satisfied that carrying his wife's ashes to be with his children, and then to spend some time with them, working through their mutual grief, would have had a significant therapeutic value for Mr Papatua and that that was the main reason for his visit. The added element of "enua" did not exist in his environment in Melbourne, but I accepted, adopting Dr Daniela-Wong's views, that it was desirable for Mr Papatua's recovery that he should have been in a supportive environment away from the place with which the trauma of his wife's tragic accident and death was associated.

[96] I was satisfied that Mr Papatua, like Ms Vainu, genuinely believed that being with his children in Melbourne would assist him to overcome his deep grief and that that was the purpose for his visit. There is no evidence that, prior to his wife's tragic accident, he had any intention of travelling to Melbourne from the Cook Islands for any other purpose. I accepted also, therefore, that Mr Papatua's absence in Melbourne would not have occurred had it not

been for his wife's tragic death and his need to be with his children for self-healing. In the absence of precise the date of Mr Papatau's departure from Melbourne, I declined to speculate about when that occurred and whether he had merely been a transit passenger in visiting New Zealand before landing at Rarotonga. Nevertheless, I inferred from the purpose of Mr Papatua's visit that he must have stayed in Melbourne for an appreciable period.

[97] I considered that it was not relevant that Mr Papatua did not obtain expert medical advice, such as that received by Ms Vainu from Dr Daniela-Wong, and that he did not consult a practitioner of vairakau Maori. I respectfully agreed with the view of Weston CJ in *Matapo v Pukeiti*[46] that the requirement to focus on the elector's subjective purpose for being absent means that qualifying medical treatment does not require formal referral by a medical practitioner, and that self-referral is sufficient. It would be surprising if an elector who had received advice from a practitioner about the treatment received while absent was qualified to vote, whereas an elector who underwent the same or similar treatment without the benefit of such advice was not qualified.

[98] I accepted, therefore, that a qualifying absence may have self-administered medical treatment as its principal purpose, so long as a causal connection between the purpose and the absence can be established. In any event, to the extent that the description '<u>receiving</u> medical treatment' involves the notion of interaction between the subject of the treatment and some other intervening person or source, Mr Papatua's interaction with his children was the significant element in Mr Papatua's rehabilitative visit to Melbourne.

Conclusions

[99] On a balance of probabilities and for the reasons given, I made these findings:

Mr Papatua

(a) The period between 9 February 2022 and Mr Papatua's arrival in Melbourne around 30 or 31 March 2022 was not a continuous period exceeding three months.

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46 *Matapo v Pukeiti* [2011] CKHC Misc. No. 111/2010, at [9].

(b) The period after 30 March 2022 during which Mr Papatua stayed with his children in Melbourne was a continuous period of absence from the Cook Islands not exceeding four years spent by him outside the Titikaveka constituency for the purpose of receiving medical treatment in terms of s 7(6)(a)(ii) of the Act.

(c) The period between Mr Papatua's departure from Melbourne and his arrival in the Cook Islands on 29 May 2022 was not a continuous period exceeding three months.

(d) It follows that the period between 9 February 2022 and 29 May 2022 during which Mr Papatua was absent from the Cook Islands was not a continuous period of absence in terms of s 7(4) of the Act that disqualified Mr Papatua from being an elector in the Titikaveka constituency.

(e) Mr Papatua's vote was valid.

Ms Vainu

(f) The period between 21 October 2021 and 18 May 2022, during which Ms Vainu was in Mangaia, was a continuous period of absence from the Titikaveka constituency not exceeding four years spent by her outside the Titikaveka constituency for the purpose of receiving medical treatment in terms of s 7(6)(a)(ii) of the Act.

(g) The period should not be regarded or treated as period of absence in terms of s 7(4) of the Act that disqualified Ms Vainu from being an elector in that constituency.

(h) Ms Vainu's vote was valid.

C H Toogood, J