

CHUUK STATE SUPREME COURT APPELLATE DIVISION

TAKUCHY SHIRAI and MASAKO SHIRAI SERIOUS, ) CIVIL APPEAL NO. 01-2020  
)  
Petitioners, )  
)  
vs. )  
)  
HONORABLE KERIO WALLIBY, the CHUUK LAND )  
COMMISSION, CHUUK STATE, SENIOR LAND )  
COMMISSIONER MANEICHY SONIS, ASSOCIATE )  
COMMISSIONER LEO JOHN, ASSOCIATE )  
COMMISSIONER HARRIS PHILLIP, ASSOCIATE )  
COMMISSIONER DOMININO ALWAYS, )  
ASSOCIATE COMMISSIONER ISTOR MURITOK, )  
JACK FRITZ, CATHARINA NEDELEC, MORIA )  
RUBEN, BJ MORI, KEMBO MIDA, JR., VINCENT )  
IRONS, LESTER MERSAI, MYJOYLYNN MARIE )  
KIM, and JOHNNY MEIPPEN, )  
)  
Respondents. )  
\_\_\_\_\_ )

ORDER DISMISSING PETITION

Decided: August 28, 2020

BEFORE:

Hon. Larry Wentworth, Temporary Justice, Presiding\*  
Hon. Mayceleen J.D. Anson, Temporary Justice\*\*  
Hon. Eliesa Tuiloma, Temporary Justice\*\*\*

\*Associate Justice, FSM Supreme Court  
\*\*Associate Justice, Pohnpei Supreme Court  
\*\*\*Legislative Counsel, Chuuk Legislature

APPEARANCES:

For the Petitioners: Roy T. Chikamoto, Esq.  
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Honolulu, Hawaii 96828-1199

For the Respondents: Jack Fritz, Esq.  
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HEADNOTES

Courts – Recusal – Rule of Necessity

The "rule of necessity" cannot be used to allow an otherwise disqualified justice to act as long as it is possible to appoint a temporary judge who is not disqualified. But, when all Chuuk State Supreme Court justices are disqualified and no associate justice can appoint an appellate panel in the Chief Justice's place, and since there is no provision for the Chief Justice to appoint a temporary justice to make the appointments, then the rule of necessity, in this very limited circumstance, applies and allows the Chief Justice to make the appellate panel appointments. Shirai v. Walliby, 23 FSM R. 14, 16 (Chk. S. Ct. App. 2020).

Mandamus and Prohibition – Nature and Scope

The requirements for the issuance of an extraordinary writ of prohibition are 1) that a court or an officer is about to exercise judicial or quasi-judicial power; 2) that the exercise of such power is unauthorized or the inferior tribunal is about to act without or in excess of jurisdiction; and 3) this may or will result in damage or injury for which there is no plain, speedy, or adequate legal remedy. Each of these elements must be satisfied for a writ of prohibition to issue. Shirai v. Walliby, 23 FSM R. 14, 16 (Chk. S. Ct. App. 2020).

Mandamus and Prohibition – When May Issue

A writ of prohibition or mandamus will not issue when the petitioners have an adequate legal remedy in a hearing (evidentiary, if necessary) before a trial division justice (regular or temporary) other than the judge they seek to disqualify, as provided for by Section 22(5) of the Chuuk Judiciary Act, a legal remedy even superior to the appellate division remedy the petitioners seek because a trial division justice in a Section 22(5) trial division hearing can, if necessary, take evidence and make factual findings before determining whether the facts and the law require that the judge be disqualified, but an appellate court does not (and cannot) make factual findings. Shirai v. Walliby, 23 FSM R. 14, 16-17 (Chk. S. Ct. App. 2020).

Mandamus and Prohibition – When May Issue

No writ will issue when, if the appellate court were going to issue a writ, that writ would have ordered the challenged judge to refer the issue of his disqualification to the Chief Justice for the Chief Justice to assign the disqualification issue to another justice for hearing and decision, as required by the Chuuk Judiciary Act, Chk. S.L. No. 190-08, § 22(5), but the challenged judge has already taken that step. Shirai v. Walliby, 23 FSM R. 14, 17 (Chk. S. Ct. App. 2020).

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COURT'S OPINION

PER CURIAM:

Takuchy Shirai and Masako Shirai Serious have filed a petition asking us to issue a writ of mandamus. For the reasons that follow, we deny the petition and dismiss it without prejudice.

I. WRIT REQUESTED

This petition for a writ of mandamus, filed January 16, 2020, asks for two forms of relief. It asks for a writ compelling respondent Associate Justice Kerio Walliby to rule on the petitioners' motion that he recuse himself in the Chuuk State Supreme Court trial division matter, SP No. 124-2019 so that the trial division petition for a writ of mandamus can move forward in a timely fashion, and the petitioners ask for a writ of mandamus compelling Justice Walliby (if he remains as the presiding judge in SP No. 124-2019), or his successor, to set an hearing date in the trial division matter earlier than April 28, 2020.

Shirai v. Walliby  
23 FSM R. 14 (Chk. S. Ct. App. 2020)

The request for a writ compelling the trial division justice presiding over SP No. 124-2019 to set an early hearing date before April 28, 2020 has, as the petitioners acknowledge in their May 5, 2020 filing, now become moot. This leaves, as the relief sought, a writ of mandamus preventing Justice Walliby from continuing to preside over SP No. 124-2019, as the sole remaining form of relief that the petitioners seek. In other words, the petitioners seek a writ of prohibition barring Justice Walliby from proceeding further in the matter.

We take judicial notice that in December 2019, Justice Walliby referred the motion to recuse himself to Chuuk Chief Justice Camillo Noket to be assigned to another justice for hearing and decision, as required by the Chuuk Judiciary Act, Chk. S.L. No. 190-08, § 22(5).

## II. VALIDITY OF PANEL'S APPOINTMENT

Before addressing the petition's merits, we must first consider the claim by respondents Jack Fritz and Myjoylynn Marie Kim, in their May 6, 2020 filing, that Chief Justice Noket (and by extension any later acting chief justice) could not appoint the temporary presiding justice or any other panel member because he was disqualified from acting in this case due to a conflict. We also note that all Chuuk State Supreme Court associate justices (with the possible exception of Justice Walliby whose qualification is challenged by this petition) are disqualified due to conflicts.

We must reject this claim because this is one of those very limited circumstances when the rule of necessity applies, allowing an otherwise disqualified justice to act. The "rule of necessity" cannot be used to allow an otherwise disqualified justice to act as long as it is possible to appoint a temporary judge who is not disqualified. Ruben v. Petewon, 14 FSM R. 146, 148 n.1 (Chk. S. Ct. App. 2006). But, when all Chuuk State Supreme Court justices are disqualified and there is no associate justice that can appoint an appellate panel in the Chief Justice's place, and since there is no provision for the Chief Justice to appoint a temporary justice to make the appointments, then the rule of necessity, in this very limited circumstance, applies and allows the Chief Justice to make the appellate panel appointments. Cholymay v. Chuuk State Election Comm'n, 10 FSM R. 145, 152 (Chk. S. Ct. App. 2001).

Since our appointments are valid, we may consider the petition's merits.

## III. WRIT'S REQUIREMENTS

The requirements for the issuance of an extraordinary writ of prohibition are (1) that a court or an officer is about to exercise judicial or quasi-judicial power; (2) that the exercise of such power is unauthorized or the inferior tribunal is about to act without or in excess of jurisdiction; and (3) this may or will result in damage or injury for which there is no plain, speedy, or adequate legal remedy. Albert v. O'Sonis, 15 FSM R. 226, 231 (Chk. S. Ct. App. 2007); Nikichiw v. Petewon, 15 FSM R. 33, 37 (Chk. S. Ct. App. 2007); Ruben v. Petewon, 14 FSM R. 177, 182 (Chk. S. Ct. App. 2006); Election Comm'r v. Petewon, 6 FSM R. 491, 497 (Chk. S. Ct. App. 1994). Each of these elements must be satisfied for a writ of prohibition to issue. Etscheit v. Amaraich, 14 FSM R. 597, 600 (App. 2007).

## IV. ANALYSIS

The petitioners have an adequate legal remedy – a hearing (evidentiary, if necessary) before a trial division justice (regular or temporary) other than Justice Walliby on their SP No. 124-2019 motion to disqualify Justice Walliby, as provided for by Section 22(5) of the Chuuk Judiciary Act. That legal remedy even appears superior to the remedy the petitioners seek here. That is because the trial division justice in a Section 22(5) trial division hearing can, if necessary, take evidence and make factual findings before determining whether the facts and the law require that Justice Walliby be disqualified. An appellate court

does not (and cannot) make factual findings. Iriarte v. Individual Assurance Co., 18 FSM R. 406, 408 (App. 2012); In re Sanction of George, 17 FSM R. 613, 616 (App. 2011). It must rely on either adjudicated, stipulated, or undisputed facts.

Since the petitioners have an adequate, or even superior, legal remedy available, no writ will issue. If we were going to issue a writ, that writ would have ordered that Justice Walliby refer the issue of his disqualification to the Chief Justice for the Chief Justice to assign the disqualification issue to another justice for hearing and decision, as required by the Chuuk Judiciary Act, Chk. S.L. No. 190-08, § 22(5). Justice Walliby has already taken that step.

#### V. CONCLUSION

Accordingly, since the petitioners have an adequate legal remedy available, this petition is dismissed without prejudice.

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