

**IN THE HIGH COURT OF
NIUE (CIVIL DIVISION)**

UNDER Section 90, Niue Assembly Act 1966
IN THE MATTER Petition for Inquiry
BETWEEN PULETAMA TOFUA
Applicant
AND NIUE PUBLIC SERVICE
COMMISSION
Respondent

Hearing: 23 May 2011

Judgment: 3 June 2011

DECISION OF HIS HONOUR JUSTICE ISAAC

Introduction

[1] This case concerns a petition for inquiry in terms of section 90 of the Niue Assembly Act 1966 (the Act). The petition, signed by Puletama Tofua and other electors from the Makefu constituency, seeks inquiry into two names, Vivaliatama Talagi and Noel Talagi, listed on the Makefu electoral roll and submits that these should have been listed on the Namukulu electoral roll. The petitioners consider that the decision made the Niue Public Service Commission (NPSC) to retain Vivaliatama Talagi and Noel Talagi on the Makefu constituency was incorrect.

Background

[2] The Niue general election was held on 7 May 2011. On 9 May 2011 Salido Tongia was declared to be elected as the legislative Assembly representative for the Makefu Constituency.

[3] Section 4(1)(a) provides that a Registrar be required to maintain and update the electoral rolls of each village constituency. The Registrar of the Makefu village roll, Puletama

Tofua Misihekesi, advised the Chief Electoral Officer that Reverend Pope Tuma Talagi, along with his wife and son Vivaliatama and Noel Talagi, should be removed from the Makefu roll and placed on the Namukulu roll. The reason stated was that they had resided in Namukulu for more than three months prior to the election, which according to section 2 of the Act means that they are a resident of that village.

[4] The Chief Electoral Officer agreed. On 18 April 2011 he recommended the transfer of Reverend Talagi, Vivaliatama and Noel Talagi from the Makefu Roll to the Namukulu roll.

[5] Vivaliatama and Noel Talagi appealed this decision. Reverend Talagi did not.

[6] A letter signed by Rabeth Seumanu for the NPSC was sent to the Secretary for Justice on 21 April 2011. This letter stated that the NPSC did not approve the transfer of Vivaliatama and Noel Talagi to the Namukulu Electoral Roll. It referred to section 15 of the Act as the basis for its decision.

[7] This decision of the NPSC is the subject of this petition.

Jurisdiction

[8] In her closing submissions, Counsel for the Crown questioned the Court's jurisdiction to review the decision of the NPSC by way of a petition under section 90 of the Act.

[9] Mr Guest, for the petitioners, submitted that the petitioners' case was based on the facts of the case and not on electoral law. He submitted that the High Court did have jurisdiction under section 90 because voter eligibility was part of an election.

[10] Although the question of the Court's jurisdiction was only raised in closing submissions it is a matter that needs to be considered at the beginning of this decision.

[11] Section 90(1) reads:

Where any candidate and 5 electors, or where they are 10 electors, are dissatisfied with the result of any election held in respect of which that candidate is nominated, or in which those electors are registered, they may, within 14 days after the declaration or the result of the election, by petition filed in the High Court as hereinaftermentioned, demand an inquiry as to the conduct of the election or of any candidate or other person at it.

[12] Crown Counsel submitted that section 90(1) was restricted to conduct on the day of election, such as candidates coercing electors to vote in a particular way, double voting or tampering with ballot papers.

[13] I agree with Crown counsel that the words “as to the conduct of the election or of any candidate or other person at it” strongly suggest that a petition for inquiry is restricted to events on the day or days of election.

[14] Further, the scheme of the Act supports this conclusion. The Act works through various topics relating to elections and follows a consistent chronological approach. That is, the parts of the Act first deal with the officers in charge of elections, then the qualifications someone must have to be a candidate, followed by the qualifications of electors and appropriate electoral rolls process.

[15] After these three parts, Part 4A, entitled “Conduct of Elections” outlines a number of aspects of an election, including nomination of candidates, polling place and hours, ballot box security during polling, special voting.¹ Then a number of ‘post voting’ procedures are outlined: preliminary counting of votes; scrutiny of the poll; options for recounting and disposal of ballot papers. The last sections in Part 4A deal with offences at elections, which mostly deal with incidences on the polling day such as interfering with voters (section 79); counterfeiting ballot paper and interfering with a ballot box (section 82); and maintaining secrecy of voting at the polling booth (section 84).

[16] Part 4B deals with corrupt practices such as unduly influencing someone to vote a certain way or refrain from voting and voting at an election in the name of some other person.

[17] It is clear that the Act follows a logical order beginning with the voters and the electoral roll, followed by nomination of candidates and then moving through the various stages of an election day, from polling to voting to disposal of ballot papers. Finally, it is in this context that Section 90 and Part 5 are found. In this context, the wording “conduct of the election... or any person at it” seems to relate to conduct on the day or days of polling. Indeed, most of the topics dealt with in Part 4A entitled “Conduct of Elections” deal with events or procedures only relevant to the day of an election.

[18] Accordingly, it is my view that it is not within the ambit of this section to examine the decision of the NPSC to retain names objected to on the Makefu electoral roll. Certainly, this decision clearly had an impact on the election, however, taking the scheme of the Act into consideration, it cannot be said that it was “conduct of the election... or any person at it.”

¹ I note that in what appears to be a drafting error, the Niue Assembly Act 1966 has two ‘Part 4’. The title of the first is entitled “Conduct at Elections” and I shall refer to it as Part 4A. The second, entitled “Corrupt Practices” will be referred to as Part 4B.

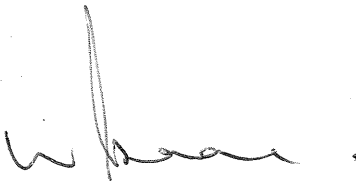
[19] As a result of the above discussion, I dismiss this petition.

[20] However, it is clearly open for any of the petitioners to file an application for judicial review of the decision of the NPSC.

[21] In the event that an application is filed, I direct that this be filed together with submissions in support by Friday 10 June. The Crown is to respond by Friday 17 June. Given I have heard extensive oral evidence on the matter, I will deal an application for judicial review on the papers alone.

[22] A copy of this decision is to go to all parties

Signed at Wellington on the 3rd day of June 2011.

A handwritten signature in black ink, appearing to read 'W W Isaac', with a long vertical stroke extending upwards from the first 'W'.

W W Isaac

JUSTICE OF THE HIGH COURT