

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

IN THE MATTER Application for judicial review

BETWEEN TOFUA PULETAMA
 Applicant

AND PONI KAPAGA, CHAIRPERSON,
 NIUE PUBLIC SERVICE
 COMMISSION
 Respondent

Judgment: 5 July 2011

DECISION OF HIS HONOUR JUSTICE ISAAC

Introduction

[1] This case concerns an application for judicial review of the decision made by the Niue Public Service Commission (NPSC) to retain Vivaliatama Talagi and her son Noel Talagi on the Makefu constituency.

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) of the Niue Assembly Act 1966 (the Act) provides that a Registrar be required to maintain and update the electoral rolls of each village constituency. On 12 April 2011, as provided for in section 20 of the Act, the Registrar of the Makefu village roll notified Reverend Pope Tuma Talagi, along with his wife Vivaliatama Talagi and son Noel Talagi, of his objection to their names being on the Makefu electoral roll on the basis that they had resided continuously in the village of Namukulu for a period of more than three months.

[4] On 15 April 2011, Vivaliatama and Noel Talagi appealed this decision under section 20 of the Niue Assembly Act 1966. Reverend Talagi did not.

[5] On 19 April 2011, the Registrar, in accordance with section 20(d) of the Act, transmitted the objection and appeal to the NPSC.

[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, and that they should be retained on the Makefu roll. It referred to section 15 of the Act as the basis for its decision.

[7] This decision was the subject of an application for a petition of inquiry, filed by Tofua Puletama and other petitioners under section 90 of the Niue Assembly Act 1966. On 3 June, I dismissed that application on the basis that it was not within the ambit of section 90 to examine the decision of the NPSC to retain the names objected to on the Makefu electoral roll.

[8] On the 10 June 2011, Mr Tofua Puletama filed this application for judicial review.

Applicant's submissions

[9] The applicant submits that the decision of the NPSC was irrational as it was reached without a proper, independent investigation and was based solely on the chairman's own personal, biased perceptions and casual observations rather than corroborated evidence.

[10] It is submitted that the inquiry was rushed because the chairperson wanted to leave Niue on May 20 and other Commissioners had been stood down because they were candidates in Village Constituency elections.

[11] A full investigation would have involved a process akin to that in *Talafasi v Togiakona* where an officer was sent to the villages of Namukulu and Makefu to establish residency of the subject persons and report to the chairperson.¹

[12] It was submitted that the application for judicial review be granted and that the decision of the NPSC be reversed as it is a decision that no reasonable decision-maker could make.

Respondent's submissions

¹ *Talafasi v Togiakona* CV 13/08, 2 May 2008 (HC Niue).

[13] The respondent submits that the Registrar of the Makefu roll could have made any comments or recommendations (in accordance with section 19(c) of the Act) when he sent a letter to the NPSC transmitting the objection by Mrs Vivaliatama Talagi and Noel Talagi. These comments or recommendations would have assisted the NPSC in this matter.

[14] It is submitted that section 21 of the Act, which provides that the NPSC "shall determine any objection transmitted to it, after such investigation as it deems necessary", means that the investigation element is an optional and discretionary requirement rather than a mandatory requirement.

[15] The letter from the Registrar was sent on the 19th April. The NPSC made its decision on the 20th April and the NPSC secretariat response to that effect was written on the 21st April, six days before the rolls closed. It is submitted that given these time constraints, the Commissioners undertook the best option available to them.

[16] It is acknowledged that the Chairperson used his personal knowledge and sight as a basis for his decision. This knowledge was gained through his residence in Tuapa (a village between Namukulu and Makefu) and his frequent visits to Namukulu throughout the week.

[17] Article 66 of the Niue Constitution 1974 requires a quorum of two commissioners and at least two members of the Commission to concur in any decision. This process was adhered to as the decision was agreed to by Commissioner Taumalua.

[18] Counsel for NPSC submitted that a reasonable interpretation of the intention of the Niue Assembly Act 1966 is that all matters pertaining to electors are to be dealt with prior to an election. It is acknowledged that the Court has an inherent power to deal with judicial reviews, however it is submitted that the Court has no specific power as outlined in Part 5 of the Niue Assembly Act 1966 with regards to judicial review of a closed electoral roll after the elections.

[19] It is further submitted that there were no appeals to the NSPC decision. The Department for Justice, Lands and Survey (DJLS) publically posts the electoral roll to allow electors to confirm that their names appearing on the roll as appropriate or for any person to object to a person appearing on that roll. Accordingly, a prudent candidate for any electoral seat would check to ensure that the electors on the roll appear as they should before the election day.

Law

[20] The following provisions of the Act are relevant:

15 Place of residence

A person shall be deemed to reside where he has his usual place of abode at any material time or during any material period, notwithstanding his occasional absence from it, and notwithstanding his occasional absence on leave from his occupation or employment.

18 Objections to registration

Any name on any roll may be objected to, either by the Registrar in charge of that roll or by an elector whose name appears on that roll, on the ground that the person whose name is objected to is not qualified to be registered or is not qualified to be registered on the roll on which his name appears.

20 Objection by Registrar

If the objection is by the Registrar in charge of any roll, the following provisions shall apply –

- (a) The Registrar shall give notice in writing to the person objected to of the grounds of the objection and intimate in the notice that, unless notice of appeal is given within a time stated (being not less than 4 clear days), the name of the person objected to will be removed from the roll without further proceedings;
- (b) The notice of objection shall be in form 4, and the form of notice of appeal set out in that form shall be annexed to it;
- (c) If the person objected to does not, within the time stated in the notice, satisfy the Registrar that he is entitled to have his name retained on the roll, or fails to give notice of appeal, the Registrar shall remove the name forthwith;
- (d) If notice of appeal is duly given, the Registrar, if he is satisfied that the appellant is entitled to have his name retained on the roll, shall withdraw his objection and notify him accordingly, but if he is not so satisfied, he shall transmit his objection and the appeal, together with any comments on it he may wish to make, to the Niue Public Service Commission.

21 Determination of objections

The Niue Public Service Commission shall determine any objection transmitted to it, after such investigation as it deems necessary, and shall direct the Registrar in

charge to retain the name objected to on the roll on which it appears or, as the case may be, to remove it therefrom, or to transfer it through the Chief Electoral Officer to any other roll, or to make such amendment of any roll as may be necessary to give effect to the determination, and every such determination of the Niue Public Service Commission shall be final.

Discussion

Jurisdiction

[21] Judicial review is part of the inherent jurisdiction of the High Court. It has been developed by superior Courts to fulfil their supervisory function of administering justice according to law.² It is a means to hold those who exercise public power accountable for its exercise, especially when those decisions lie outside the control of the political process.³

[22] Counsel for the respondent acknowledges that the Court has an inherent jurisdiction to uphold principles of natural justice and to deal with judicial reviews. However, counsel for the respondent submits that the Court has no specific power outlined in the Act with respect to judicial review of a closed electoral roll after the elections. However, judicial review is an inherent jurisdiction, not a statutory right like the right to appeal. Therefore it is of no consequence that the Niue Assembly Act 1966 does not specifically make provision for judicial review of an electoral roll. I can think of no substantial reason why this should not come within the Court's inherent judicial review powers. Of course it would have been preferable that the application came before the electoral roll was closed, and before the elections. However, I do not consider it a bar that this application came afterward.

[23] The proper concern with judicial review is with the decision-making process, not the decision itself.⁴ The High Court is not an "administrative appeal tribunal".⁵ This principle was expressed by Lord Brightman in *Chief Constable of the North Wales Police v Evans* in this way:

² *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA) at 682.

³ *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) and *Eshugbayi Eleko v Government of Nigeria (Officer Administering)* [1931] AC 622 at 670 (PC).

⁴ *Talafasi v Togiakona* CV 13/08, 4 May 2008 (HC Niue). See also, *Re Erebus Royal Commission (No 2)* [1981] 1 NZLR 618 (CA) and *D v M and Board of Trustees of Auckland Grammar School* [2003] NZAR 716 at 731.

⁵ *Waitakere City Council v Waitemata Electricity Shareholders Society Inc* High Court Auckland, M 1524/95, 3 December 1995. See also *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 (SC).

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will... under the guise of preventing the abuse of power, be itself guilty of usurping power.⁶

Investigation function of NPSC

[24] NPSC's interpretation of the investigative element of section 21 is that it is an optional and discretionary requirement rather than a mandatory requirement. I do not agree with this interpretation. The relevant part of section 21 states "The Niue Public Service Commission shall determine any objection transmitted to it, after such investigation as it deems necessary". I take 'such', in this context, to mean 'of a degree, manner or quality'. So in other words, the NPSC shall, after undertaking an investigation – of a degree, manner of quality that it deems necessary – determine any objection transmitted to it. There is no discretion as to whether it carries out an investigation or not. The only discretion is to the degree, manner or quality of the mandatory investigation.

[25] Accordingly, the NPSC was required to carry out an investigation under section 21. From the time it received the objection on 19 April, it had 8 days to carry out an investigation and make a decision before the Electoral Roll closed on 27 April. While this is a not a long time, it is certainly long enough to carry out the investigation required in the circumstances. Instead, nothing was done; no evidence was adduced, no one was consulted, no one was sent to inquire at Namukulu or Makefu villages and no report was made.

[26] The Chairperson, by his own admission, stated that he used his personal knowledge and sight as a basis for his decision. This knowledge was gained through his residence in Tuapa (a village between Makefu and Namukulu) and his frequent fishing trips which required him to drive past Namukulu throughout the week. This certainly cannot be called an investigation. Accordingly, the Chairperson failed to adequately carry out his decision making responsibility. Decision-makers must correctly understand and give effect to their decision-making powers.⁷ The NPSC did not do so and this omission is a reviewable error.

[27] Further, even if it were not compulsory to carry out an investigation according to the statutory scheme, in any case, it is a breach of natural justice for a decision-maker to decide

⁶ See *North Wales Police v Evans* [1982] 1 WTR 1155 at 1173 (PC).

⁷ *Council of civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410 (HL).

without hearing all of the evidence.⁸ It is clear that "Authorities must act on information that is reliable, expert, independent and comprehensive".⁹

[28] In *R v Deputy Industrial Injuries Commissioner; Ex p Moore*, Diplock LJ stated that a decision-maker must base its decision on material which "as a matter of reason, has some probative value".¹⁰ This is an application of the broader principle that no reasonable authority would proceed to action without being sufficiently informed.¹¹ Similarly, the Privy Council, in *Re Erebus Royal Commission* affirmed that a decision-maker exercising investigative functions is bound by the probative evidence rule and must submit to close scrutiny of its reasoning and findings. An insufficient factual foundation for a finding, or reasoning which is contradictory or flawed, will vitiate the decision.¹²

[29] Thus, even if I agreed with the respondent's interpretation of section 21, I would have found that NPSC did not fulfil their decision making responsibilities under natural justice considerations relating to the probative rule. This alone is enough to quash the NPSC decision and remit the issue back to them for proper investigation and decision making.

[30] Given this finding, it is not necessary to examine the applicant's contention that the NPSC acted irrationally.

Role of Registrar

[31] Counsel for the respondent submitted that the Registrar's letter was transmitted to the NPSC according to section 19(c) of the Act and noted that no recommendations or comments were made even though they would have assisted the NPSC. The implication seemed to be that this mitigates the NPSC's failure to investigate.

[32] First, section 19(c) is not applicable in this case because that governs the situation when the objection to any name on a roll is made by an elector. In this case, the objection was made by the Registrar; this is governed by section 20, which is worded slightly differently. Section 20(d) states that if the Registrar is not satisfied that the appellant is entitled to have his name retained on the roll, he shall transmit his objection and the appeal, together with any comments on it he may wish, to the NPSC. Therefore, there was no provision for the Registrar to make any recommendations.

⁸ P A Joseph, *Constitutional and Administrative Law* (3rd edition Thomson Brookers, 2007) at 980.

⁹ P A Joseph, *Constitutional and Administrative Law* (3rd edition Thomson Brookers, 2007) at 982.

¹⁰ *R v Deputy Industrial Injuries Commissioner; Ex p Moore* [1965] 1 All ER 81 at 94.

¹¹ P A Joseph, *Constitutional and Administrative Law* (3rd edition Thomson Brookers, 2007) at 982.

¹² *Re Erebus Royal Commission; Air NZ Ltd v Mahon* [1983] NZLR 662 (PC).

[33] Further, the New Zealand Supreme Court has held that in appropriate cases decision-makers may be required to make independent inquiries beyond those undertaken by council officials.¹³ This is when it is not even prescribed in the legislation as section 21 of the Act does in this case. Further, it is a firmly established principle that the one who decides must hear. That is, the decision must be by the deciding body and not by one of its committees or officials.¹⁴ 'Rubber-stamping' of official recommendations or de facto delegations not authorities by the statutory scheme is not appropriate.¹⁵

[34] The Registrar was free to make comments and these might have been of assistance to the NPSC. However, it is not a mitigating factor that the Registrar chose not to. There is absolutely no doubt that the responsibility for the investigation and decision making lay with the NPSC. It did not fulfil this responsibility.

Appeals to the decision

[35] Counsel for NPSC submitted that the applicant, as a prudent candidate, should have checked the electors and made an appeal of the NPSC decision.

[36] While it may have been in the applicant's interest to have checked the electors in his constituency, he could not have appealed the NPSC decision. Appeal is a statutory process¹⁶ but there is no statutory authority for appeal in this instance. Indeed, section 21 makes it clear that the NPSC's determination of an objection is "final". The only correct avenue for the applicant was judicial review.

Considerations for decision makers

Reasoned decisions

[37] While the New Zealand Court of Appeal recognised in *R v Awatere* that there is no general duty on decision-makers to give reasons for their decisions, it held that it is always good practice to provide a reasoned decision.¹⁷ Similarly, the High Court in *Potter v NZ Milk Board* stated that it was a public responsibility of both courts and administrative decision-makers to provide reasons.¹⁸ To fail to do so may invite a finding on judicial review that

¹³ *Discount Brands v Westfield (NZ) Ltd* [2005] 2 NZLR 597 (NZSC).

¹⁴ *Jefferies v NZ Dairy Production Marketing Board* [1956] NZLR 1057 at 1067 (PC).

¹⁵ *Videbeck v Auckland CC* 3 NZLR 842 at 861 (HC).

¹⁶ There is no common law right of appeal: *Guy v Medical Council of NZ* [1995] NZAR 67 at 93 – 94.

¹⁷ *R v Awatere* [1982] 1 NZLR 644 (CA).

¹⁸ *Potter v NZ Milk Board* [1983] NZLR 620 (HC) at 624.

improper considerations materially influenced the outcome,¹⁹ that the decision lacked foundation and was arbitrary.²⁰

Duty to act consistently

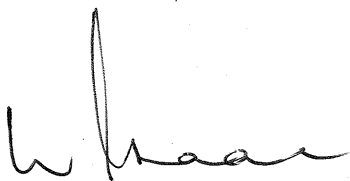
[38] Equality before the laws means that decision-makers must be consistent in the procedures and criteria they apply (procedural constituency) and that like cases ought to be decided alike (substantive constituency).²¹ This has been held to be of “the highest public importance”.²² Inconsistency of treatment or substantive outcome may amount to an abuse of discretion under the broader judicial review ground of unreasonableness. The procedures outlined in *Talafasi v Togiakona* ought to be kept in mind in order for the NPSC to be consistent in their decision making procedures in like cases.²³

Conclusion

[39] As a result of the above discussion I grant this application for review and quash the decision of the NPSC. However, as my jurisdiction relates to process only, I decline to substitute my own decision of the substantive issue. That matter is remitted back to the NPSC, who must carry out the proper procedures as required by the Act and in accordance with the legal principles set out in this decision.

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

Signed at Wellington on the 5th day of July 2011.



W W Isaac

JUSTICE OF THE HIGH COURT

¹⁹ As in *Fiordland Venison Ltd v Minister of Agriculture and Fisheries* [1978] 2 NZLR 341 at 345 (CA).

²⁰ *NZ Fishing Industry Assn Inc v Minister of Agriculture and Fisheries* [1988] a NZLR 544 at 554 (CA).

²¹ P A Joseph, *Constitutional and Administrative Law* (3rd edition Thomson Brookers, 2007) at 900.

²² *Reckett & Colman (NZ) Ltd v Taxation Board of Review* [1966] NZLR 1032 at 1042 (CA).

²³ *Talafasi v Togiakona* CV 13/08, 4 May 2008 (HC Niue).