Sione Tu'ifua Vaikona v Teisina Fuko (No. 2)

Supreme Court, Nuku'alofa
Webster J.
Civil, case No. 14 / 1990

2, 3, 4, 24 April 1990

10 *Election – qualification for election*

Constitution – principles of interpretation

Constitution – English and Tongan texts – Tongan text to prevail

Appeal – taxation of costs – no right of appeal – whether "an order made in any court"

The petitioner challenged the election of the respondent as a people's representative for Ha'apai on the ground that the respondent was disqualified from
20 election by clause 65 of the Constitution in that a court order made against him, taxing the costs to be paid by him in earlier court proceedings in which he had been involved, had not been paid on the day of nomination. The respondent gave evidence that the Legislative Assembly had approved that this debt be paid off by deductions from his parliamentary salary, but unknown to him those deductions had not been made; and that when the matter was brought to his attention he paid the full debt himself, after his nomination form was filed but 2 days before the election. He claimed that he was not disqualified because

(i) the relevant day was election day and not nomination day;
30 (ii) the money was not "outstanding" because of the arrangement made with the Legislative Assembly;
(iii) the order on taxation of costs was not "an order of any court" because clauses 50 of the Constitution requires a right of appeal from the Supreme Court, and by section 16(9) (now s. 17(9)) of the Supreme Court Act there is no appeal from a decision on taxation.

HELD:

(1) Although a written Constitution is normally to be interpreted generously and
40 flexibly, where the meaning of its words was plain and unambiguous the ordinary meaning must be adopted.
(2) The meaning of the words in clause 65 was plain and unambiguous and could not be departed from by the court; the relevant date was nomination day, and the respondent would be disqualified from election if a court order for a specific sum of money was outstanding on that day;
(3) Where there is inconsistency between the Tongan and English texts of the constitution, as in clause 50, the Tongan text must prevail;

(4) Clause 50 was written in a loose style and should not be interpreted literally or rigidly, and accordingly should be interpreted as not applying to orders made on taxation of costs;
(5) Accordingly section 16(9) (now section 17(9)) of the Supreme Court Act is not inconsistent with clause 50 of the constitution;
(6) The order made on taxation was "an order...made in any court" for the purpose of clause 65 whether made in open court or in chambers;
(7) As the money had not been paid the respondent was therefore disqualified;
10 (8) The court must make a determination that the election was void, but could not make a determination of a move-up result.

Statutes considered : Constitution, cl 50, 65
Supreme Court Act, s16(a)

Cases considered :

Tu'itavake Sunia Mafile'o v Porter Civil case 24/1989
20 *Sanft & Siale v Paasi* Appeals 7,8,9/1987

Counsel for the petitioner : Mr W. C. Edwards
Counsel for the respondent : Mr L. M. Niu

Judgment

Preliminary

This is an election petition complaining of the unlawful election at the General
20 Election on 15th February, 1990 of the Respondent Teisina Fuko as No. 1 People's Representative for Ha'apai. The Petitioner is an elector in Ha'apai.

The petition is the first brought under section 25 of the Electoral Act, 1989 and the grounds are that the Respondent is disqualified under clause 65 of the Constitution, which states –

> "65. Representatives of the people shall be chosen by ballot and any person who is qualified to be an elector may be chosen as a representative, save that no person may be chosen against whom an order has been made in any Court in the Kingdom for the payment of a specific sum of money
> 40 the whole or any part of which remains outstanding or if ordered to pay by instalments the whole or any part of such instalments remain outstanding on the day on which such person submits his nomination paper to the Returning Officer..."

The Court ruled on 3rd April that there was no case to answer on a further ground alleging that the respondent made a false statement in his nomination paper.

The Petitioner alleges that the Respondent owed such a debt which remained outstanding on nomination day.

The Respondent says in defence that he was not disqualified because the
50 relevant date is election day and not nomination day; the money did not remain

outstanding because an arrangement was made for it to be deducted from his Legislative Assembly salary and allowances but this was not carried out by the Clerk to the Assembly; and further that the order for payment was not made by a court because there was no appeal from a judge on taxation as required by clause 50 of the Constitution.

The Court heard evidence for the Petitioner from the Assistant Registrar of this Court, Sione Folau Lokotui; the Chief Returning Officer, Mataiasi Lua Holani, who is also acting as Chief Clerk to the Legislative Assembly; and the Accountant-
60 General, Siaosi Nakao. The only witness for the defence was the Respondent himself.

The Facts

The facts are straightforward and largely undisputed. In 1986 the Respondent who was then an MP, and another MP Hopate Sanft, brought an action in this Court against the Speaker, the Chairman of the Committee of the Assembly, the Minister of Finance and the Legislative Assembly itself. They claimed that a certain Bill had not been passed lawfully by the Assembly. On 9th January, 1987 Martin J. struck out the claim for want of jurisdiction, with costs against the plaintiffs,
70 to be taxed if not agreed. The Plaintiffs appealed to the Privy Council (but not against the award of costs) but on 3rd August, 1987 the appeal was dismissed with no order as to costs in the Privy Council. Martin J. taxed the defendant's bill of costs at $1,383 on 8th January, 1988, to be paid by the plaintiffs Mr Sanft and Mr Fuko.

Nothing further appears to have happened until 13th October, 1988 when Mr Sanft and Mr Fuko wrote to the Speaker asking the Assembly not to demand payment as they had not been seeking personal gain but only acted for the interest of the whole country. The Assembly deferred consideration and no further action was
80 taken on it. Then just prior to the close of the Assembly for 1988, the two wrote again on 7th November, asking the House to allow the debt to be paid in the following year and the Clerk to make deductions from their salaries until paid. On 8th November the minutes of the House record consideration of this letter, stating "So they have brought their letter of request, to propose that the Clerk commence to deduct this debt from their salary next year in the House? Would you who agree to this (proposal) please show it by raising your hand." This was agreed with 9 votes for and none against.

Mr Holani was Chief Clerk to the Assembly at that time but said a new Chief
90 Clerk, Manu Misinale was appointed for the year 1989 and on 3rd January, 1989 wrote to Edwards Paasi & Co., one firm of lawyers who had acted for the defendants in the case. Mr Misinale communicated the request in the letter of 7th November and hoped the lawyers would agree to the letter. No evidence was given of any reply to that letter being made by the lawyers.

Subsequently no deductions were made by the Clerks from the salaries or allowances of Mr Sanft or Mr Fuko. No explanation of this was given in evidence but the result was that the debt of $1,383 had not been paid by nomination day for the 1990 elections on 11th January, 1990. The Respondent admitted in evidence
100 that he had forgotten about the debt. He had not given any written authorisation

for definite amounts to be deducted from his salary or allowances, nor had he checked with the salaries clerk that the deductions had been made. I accept that his weekly payments cheque from the Assembly would have varied in amount according to the number of extra meetings he attended: this would go against him being able to tell at a glance whether the deductions were being made. Mr Fuko did not always check his salary cheque and put it straight into the bank. All this I accept even if it seems somewhat casual for a former bank manager.

On 11th January, 1990 the Respondent's nomination paper was lodged with 110 the Returning Officer at Ha'apai containing a certificate according to Form 4 of the Electoral Act declaring"... that I am not in accordance with clause 65 of the Constitution, in arrears under any judgment given by a Court in the Kingdom for the payment of any sum." and signed by the Respondent. Three days before the election, while the Respondent was at Foa, Ha'apai, he received a telegram from the Supervisor of Elections about the matter. He immediately rang his wife in Nuku'alofa to settle the debt. She had to wait overnight until the Treasury found the appropriate account to accept payment and the debt of $1,383 was eventually paid in full on 13th February, 1990, i.e. two days before the election.

At the election on 15th February Mr Fuko was elected as No. 1 People's 120 Representative for Ha'apai and it is that election against which the Petitioner now complains.

On the face of these facts it would seem that the Respondent was disqualified under clause 65 from being elected, but the Court must consider the defences submitted by Mr Niu for the Respondent.

Interpretation of the Constitution

Recent interpretations of the Tonga Constitution have been given by the Land 130 Court in *Finau V Alafoki & another (19/'89)* and by this Court in *Tu'itavake Sunia Mafile'o v Porter & another (24/'89)*. Both referred to internationally recognised cases on the interpretation of constitutions such as *Hinds v The Queen [1976] 1 All E.R. 353, 359 (PC); Minister of Home Affairs v Fisher [1979] 3 All E.R. 21, 25, 26, (PC); and AG v Prince Ernest Augustus [1957] 1 All E.R. 49, 53 (HL)* as well as to regional cases such as *AG v Olomalu (W. Samoa 5894/1981)* and *Henry v AG (Cook Is 1/'83)*. In *Tu'itavake* the principles were summarised as being that the Court must -

"(1) First pay proper attention to the words actually used in context;
140 (2) avoid doing so literally or rigidly;
(3) look also at the whole Constitution;
(4) consider further the background circumstances when the Constitution was granted in 1875; ... ... [(5) is not relevant here] ......
(6) finally, be flexible to allow for changing circumstances."

The Court ought to be consistent with these earlier decisions and there is no reason to depart from these principles in this case.

Mr Niu submitted that the golden rule should be applied in the interpretation of clause 65 and referred to the Privy Council case of *Fifita v Minister of Lands* 150 *& another (3 T.L.R. 45 (1972)*. The golden rule is based on the words of Parker

CB in Mitchell v Torup [1766] Park 227 and may be applied when there is a choice of meanings as a presumption that a meaning which produces an absurd, unjust or inconvenient result was not intended. However it is emphasised that the rule is only used in the most unusual cases as a justification for ignoring or reading in words: *Cross on Statutory Interpretation (1976) pp 14–15; Halsbury's Laws (4th Ed) Vol. 44 para. 896.* It is only when a secondary meaning is available that a court can abandon a primary meaning because it produces an absurdity, ie. a result which cannot reasonably be supposed to have been the intention of the legislature. No
160 judge can decline to apply a provision because it seems to him to lead to absurd results, nor can he, for this or any other reason, give words a meaning they will not bear: *Cross p. 75.*

In any event in recent years the courts have moved away from the strict application of the literal rule, the mischief rule and the golden rule in interpreting statutes. The courts must now decide as a matter of judgment what weight to attach to any rule in the circumstances (Lord Reid in *Maunsell v Olins [1975] 1 All E.R. ER 16 (HL) at 18).* But the primary task of the court in normal cases is to give effect to the ordinary meaning of the words in their general context: *Maunsell v Olins at 25.* Nor must the judge be overzealous to search for ambiguities or
170 obscurities in words which on the face of them are plain, simply because he is out of sympthy with the policy behind the words (Lord Diplock in *IRC v Rossminster [1980] 1 All E.R. 80 (HL) at 90).*

Background of Clause 65

Clause 65 was completely replaced by Act 8 of 1978, the relevant portion being totally recast. The Court was not given any background to the circumstances of the 1978 amendment except that there was believed to be an election that year: curiously the Constitution appears to have been amended by Act 8 of 1978 after the election rather than before. Therefore the purpose will have to be found largely
180 from the words used in the clause. One possible reason can be seen from the previous wording " who is not in debt for a larger amount than is allowed by law" (enacted in 1914). This appears vague and may be even meaningless if there is no relevant law and may have caused uncertainty in the past, though that is only inference.

In view of the two subsequent comprehensive amendments, the original provisions of the 1875 Constitution are only marginally relevant, if at all, to the interpretation of the present words of clause 65. In 1875 clauses 67 and 24 show that at that time a candidate must be "not heavily in debt so that if judged it would appear that he would not be able to pay his debts," but these words and the intention
190 behind them were repealed three–quarters of a century ago in 1914. Latukefu in *"The Tongan Constitution" (1975)* explains at *pp 76–77* that major amendments were made then as the country could no longer support such a large Parliament, but does refer to clauses 67 and 24. So the background in 1875 or even 1914 cannot help in this case.

In interpretation there has to be a distinction between the new wording of clause 65, which is precise and detailed, and the loose general style of the old wording in clauses such as clause 4 (considered in *Tu'itavake*) and clause 104 (considered in *Finau).* Each of these two clauses has remained essentially unchanged since
200 the original Constitution was passed in 1875. Circumstances have altered greatly

since then. Clause 4 in particular was intended to apply to all situations almost without exception and clause 104 is equally broad in relation to all land. By contrast clause 65 deals with a very narrow area, the disqualification of election candidates because of debt and is written in a different way. Therefore there is very much less room for flexibility in interpreting the words of clause 65.

There is no choice of meanings in clause 65 and so there is no reason to apply the golden rule of interpretation. Clause 65 when applied literally does not produce a result so absurd that it could not have been conceived by the Legislative 210 Assembly when passed. It certainly differs from the disqualification in many countires of only undischarged bankrupts and it might sometimes produce an unusual result in that a person virtually insolvent could still be eligible as a candidate if he had no outstanding judgement debts: but on the other hand it may be said that the only certain way of measuring indebtedness for this purpose is to consider debts found due by a court. The terms of clause 65 may be strict, but it is not abusrd in the context of parliamentary elections. And even if the result was absurd the Court could not decline to apply clasue 65. So there is no reason to depart from the ordinary meaning of the words of clause 65.

220 *Defence of payment by election day*

However broad an interpretation is given to clasue 65 – and as stated this cannot be very broad – the Court cannot get away from the relevant date being nomination day. It is clear that the words "on the day on which such person submits his nomination paper to the Returning Officer" apply both to court order for a lump sum and to an order for instalments: this is a matter of grammatical construction. Nor is there any logical reason for clause 65 to differentiate between those two cases and Mr Niu did not suggest any. This interpretation is supported by the words of the nomination paper taken from Form 4 of the Schedule to the electoral Act 230 ie a declaration that the cadidate is not disqualified under clause 65 on nomination day. Further *Parker's Conduct of Parliamentary Elections (1987) at para 3.02*, referring to *Harford v Linskey [1899] 1 Q.B. 852* points out that any other conclusion might produce confusion, eg if the disqualification was removed on the date of the election. This seems equally applicable in Tonga. Thus a candidate has to pay debts under court orders by nomination day, not election day.

Defence that no sum remained outstanding

As already stated, the words of clause 65 are clear and precise: "remains outsanding" means in the dictionary "remains unsettled, unpaid, unresolved or owing, 240 payable." It would be almost impossible for the Court to give a wider meaning to the words even if other factors pointed that way. The words " the whole or any part of which" show that the provision was meant to apply strictly, leaving no scope for a candidate qualifying if he had paid most but not all of the sum due: even if $10 remained unpaid he would still be disqualified.

The arrangement with the Legislative Assembly in this case was not for cancellation of the debt, for it being deemed to be paid. Those had been requested by rejected. What was agreed was merely postponement of payment to the 1989 Assembly session, to be paid by unspecified deductions which never took place. 250 The Respondent did not take the trouble to check that his debt had been settled:

in law it clearly remained outstanding. The Assembly did not postpone payment idefinitely. If it had, it might have been arguable that the debt was not outstanding but that need not be considered. The position might have been different if the money had been agreed not to be repaid until say 1995, but that was not the case. The Respondent does not dispute that the sum was not paid by nomination day – so it is inescapable that in terms of clause 65 it remained outstanding on that day.

The Court also accepts the point made by Mr Edwards for the petitioner that the Assembly was not the only judgment creditor, the others being the Speaker, 260 the Chairman of the Committee of the Assembly and the Minister of Finance. There is no indication from the minutes of the House that any of those three agreed to the postponement, nor any other evidence of that.

Mr Niu also made an ingenious submission that clause 65 only covered sums awarded by a court for amounts sued for and did not cover sums awarded as costs as a by–product of an action, like the sum in question in this case. However that cannot be so as the words are clear and unrestricted – "against whom an order has been made in any Court in the Kingdom for the payment of a specific sum of money." There is nothing in the words to show that the clause is not intended to apply to 270 an order for payment of a specific sum as costs, as in this case.

Reviewing the preceding paragraphs in the light of the principles of constitutional interpretation discussed earlier, the words of clause 65 have not been interpreted any more literally or rigidly than their context requires. Nor can there be flexibility because no change of circumstances of relevance since 1978 has been shown. Looking at the Constitution as a whole offers little help with a provision so specific as this; and the background circumstances in 1875 are not relevant and cannot now support the meaning submitted by Mr Niu of "remains outstanding due to the debtor's inability to pay."

280 The conclusion is therefore that, however the matter is viewed, the relevant sum remained outstanding on nomination day.

Before leaving consideration of the meaning of these words, while it cannot affect the result of this case, in passing I have doubts about the use of the words "in arrears" in the nomination paper (Form 4). I believe these words may have a different shade of meaning than "remains outstanding" and may imply only sums which are overdue or in default (eg see *Words and Phrases Legally Defined)*. It would probably be best if Form 4 repeated exactly the appropriate words of clause 65.

290 *Defence that not court because no right of appeal*

Mr Niu's basic proposition in this defence was that when the judge made the order taxing the costs in the original action he was not a properly constituted court because there was no appeal from the taxation as required by clause 50 of the Constitution.

The power to tax an account or fees or remuneration of licensed lawyer was contained in section 16(7) of the Supreme Court Act (Cap. 8). Section 16(9) provided–

"(9). There whall be no appeal from any decision upon taxation."

300 Wherether a judge sits in chambers or in open court, all judicial business done

by a judge of the Supreme Court within his jurisdiction is done by the Court eg. *Halsbury Vol. 37 para. 345 and White Book 32/1–6/1*. In accordance with the practice of the courts taxation has for long been done in chambers *(Halsbury Vol. 37 para. 726 etc.)*. The Supreme Court is given wide jurisdiction and discretion as to how it conducts its business in the Constitution and the Supreme Court Act. There was no suggestion or evidence here that the judge was not properly appointed or somehow was not a judge of the Supreme Court. There was no submission that in some other way the judge had acted without his jurisdiction. The position is not altered
310 in relation to some particular judicial act because there may or may not be a right of appeal from that act.

Mr Niu referred to *Bribery Commissioner v Ranasignhe [1964] 2 All E.R. 785 (PC)* as authority that the decisions of a body not properly constituted are invalid, but that was a very different situation where the entire basis of appointment of the body was held to be unconstitutional.

Mr Niu also referred to the Land Court case of *Kalaniuvalu v Minister of Lands [1937] 2 T.L.R. 40* which approved the finding in the unreported case of *Minister of Lands v Pangia (1932)* that the Lands Commission set up by the Lands
320 Commission Act 1917 was not the Lands Court contemplated by the Constitution, as amended by Law No. 25 of 1916, and that the findings of the Commission were contrary to the Constitution and of no effect. Mr Niu said that the reason was that there was no appeal from the Lands Commission but the judge's notes, which are all that are now available, are very brief: that was one reason submitted to the judge but it is not clear if he had other reasons also. However the circumstances of that case were very special and cannot be taken as general authority for the absence of a right of appeal from a court leading to unconstitutionality. There is a great
330 difference between a body which is totally unconstitutional from the beginning and a constitutional body with no appeal on a minor matter.

This is not the place for comprehensive consideration in relation to a side issue of the hallmarks of a court (on which see *Halsbury Vol. 10 para. 701 etc)*, but I am satisfied from considering the Lands Commission Act 1917 that there were so many reasons in addition to the lack of a right of appeal for declaring the Commission unconstitutional that the matter was beyond doubt (eg. once-and-for-all other than continuing; inquisitorial; procedure left vague; no requirements for fair hearing or notice to affected parties; no legal qualifications for commissioners;
340 power to rehear contrary to the Constitution; and purported repeal of powers of any court, minister and the Privy Council Court of Appeal).

In any event a right of appeal is not a prerequisite for a valid court and the absence of a right of appeal cannot turn a decision validly made by a validly constituted court into an unconstitutional and thus void decision.

If I am wrong in this, the relevant portion of clause 50 reads –

> "And if any case [anythings] shall have been heard in the Supreme Court it shall be lawful for either party thereto to appeal to the Privy Council which shall rehear the case and the judgement of the Privy Council shall
350 in all cases be final..."

Mr Niu submitted that the Tongan words meant "thing" and Mr Edwards did not dispute this. I accept that, as the supreme law, the Tongan version of the Constitution must prevail in cases of conflict with the English version, and no Act can alter this unless by amendment of the Constitution itself. But it does not make any difference here. These words have been in clause 50 probably since 1875 and at least since the 1927 edition and are written in a loose general style: they have to be interpreted to allow for changed circumstances and not literally or rigidly.

It is well recognised in superior court practice that there is no automatic right 360 of appeal against interlocutory orders or awards of costs and no appeal from taxation of costs. The reasons are obvious; that the time of the highest court of appeal in the land should not be taken up unnecessarily with passing matters or rehearing decisions which are essentially in the discretion of the superior court hearing the case. So I hold that clause 50 has to be interpreted as not giving a right to appeal against the taxation of cost. Therefore section 16(9) was not ultra vires and the Court's taxation is not invalid on this ground.

Mr Edwards presented a clever argument that section 16(9) applied only to taxation of lawyer and client accounts and not to taxation of costs. Costs were provided for in section 14, with taxation of costs being provided for under the 370 Supreme Court Taxation of Costs Rules. This far I agree with him, particularly as section 16 has now been repealed by the Law Practitioners Act, 1989 and section 16(7) and (9) replaced by section 26 of the 1989 Act without repetition of the terms of section 16(9). But beyond this, for the reasons given already, I cannot concur that the silence of these Rules on appeals implies a right of appeal from taxations; and it is not necessary to deal with this point in detail.

I must add that his defence also loses force because there has been no suggestion that Mr Fuko ever tried to appeal or seek a review of the taxation or contest his liability for the costs. Indeed his letters to the Assembly in 1988 and 380 the eventual payment on 13th February this year show that he accepted his liability and the amount. Even if he had been able to have the bill of costs reduced on appeal he would still have been liable to pay some sum for the costs of the hearing before Martin J in the Supreme Court on 8th December, 1986. If Mr Niu is right that there must be an appeal under clause 50, Mr Fuko's remedy was to appeal to the Privy Council against the taxation, or at the least seek leave to appeal, but he did not do this.

Conclusion on defences

Accordingly none of the defences succeed and I find (1) that and order had 390 been made by this Court against Teisina Fuko for the payment of a specific sum of money, namely $1,383, the whole of which remained outstanding on the day on which Mr Fuko submitted his nomination paper to the Returning Officer, 11th January, 1990; and (2) accordingly Teisina Fuko was disqualified under clause 65 of the Constitution from being chosen as a representative of the people. The Court has already found that there was no case to answer on the allegation of a false declaration in his nomination paper.

If it is said that this is a harsh result for what the Respondent says is merely an oversight rather than inability to pay, the Court must make it clear that its task 400 is to interpret the law; it is the Legislative Assembly which makes the laws.

As was made clear by Lord Diplock in the case referred to by Mr Edwards, *Duport Steels v Sirs [1980] 1 All E.R. 529 (HL), 541*, the role of the Court is confined to finding from the words, which the Assembly has approved as expressing its intention, what that intention is and to giving effect to it.

Where the meaning of the words is plain and unambiguous it is not for the court to invent fancied ambiquities as an excuse for failing to give effect to the plain meaning of the words because the judge may consider that the result would be harsh or unjust or unsuitable.

410 *Section 35*

This section of the Electoral Act, 1989 reads –

"Real justice to be observed

35. On the trial of any election petition –

(a) The Court shall be guided by the merits and justice of the case without regard to legal forms or technicalities;

(b) 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 Supreme Court."

420 In their submissions on the effect of this section, both Counsel agreed that paragraph (a) referred to matters of procedure only, such as a case not being defeated merely by inadequate pleadings; and that paragraph (b) would for example allow hearsay evidence in appropriate circumstances, or, to use an instance in this case, the production of a copy of the minutes of the Assembly rather than the actual minutes in terms of section 94(b) of the Evidence Act (Cap. 13). Both specifically disclaimed the possibility of section 35, occurring in an Act, displacing the proper interpretation of clause 65 or any other clause of the Constitution; and this I certainly endorse. Beyond this it is not necessary for the decision of this case for this Court 430 to rule on the meaning of section 35, but I believe paragraph (a) may go further than mere procedure, which the words do not restrict it to, and may allow the court to take account of the substantial merits and justice of the case in the process of reaching its decision and I reserve my view on that.

Orders of declarations open to the Court

The Court also heard submissions on what orders or declarations it could make. At the end of the day both Counsel substantially agreed, and I also agree, that the Court is limited to making a determination according to section 37 of the Electoral 440 Act "whether the member whose election or return is complained of, nor any and what other person, was duly elected or returned, or whether the election was void." The Court is also bound by the Privy Council decision in Sanft & Siale v Paasi *(Appeals 7, 8 & 9/1987)* which upheld the disqualification of Siale under the Constitution and the conseqent finding that his election was void. So the Court has to determine that the election of the Respondent was void.

There was discussion before the Court of whether the case in the High Court of Australia of *In re Wood (1988) 167 C.L.R. 145* was relevant as persuasive authority for the votes for the disqualified Respondent being thrown away as invalid and 450 the qualified candidate who obtained the next highest number of valid votes (of

course after the No. 2 Representative, whose election has not been challenged) then being returned. That is a move-up result. But I find that that case is distinguishable because it concerned the single transferable vote system *(p165)* whereas Tongan representatives are directly elected by non-transferable votes; and secondly because there was no evidence of any public notice of the disqualification *(p 165; Halsbury Vol. 15 para 930, 573; Parker para. 10.09 and Re Bristol South East, Parliamentary Election [1961] 3 All E.R. 354 (DC)*. Therefore a determination of a move-up result is not appropriate here and cannot be made.

460 *Determination*

Accordingly the determination of the Court under Section 37 is that the election of 15th February, 1990 of the Respondent, Teisina Fuko as No. 1 People's Representative for Ha'apai is void.

In accordance with section 37 the Court will certify this determination in writing to the Speaker.