

IN THE HIGH COURT OF TUVALU

HC. Civil case no. 1 of 2013

Civil Jurisdiction

IN THE MATTER OF SECTION 88(2) OF THE CONSTITUTION OF TUVALU

AND

IN THE MATTER OF SECTION 7 OF THE ELECTORAL PROVISIONS
(PARLIAMENT) ACT

AND

IN THE MATTER OF AN EXPARTE APPLICATION BY THE ATTORNEY GENERAL
FOR AN ADVISORY OPINION PURSUANT TO SECTION 131(1) OF THE
CONSTITUTION TO DETERMINE A QUESTION AS TO THE INTERPRETATION
OR APPLICATION OF THE CONSTITUTION.

S. Talu for the applicant

J Udit and T Finikaso for the respondents

IN THE HIGH COURT OF TUVALU

HC. Civil case no. 2 of 2013

Civil Jurisdiction

IN THE MATTER of an application by the
Applicants for the review of a decision of the
Prime Minister and Minister Responsible for
Elections

AND IN THE MATTER of section 88 of the
Constitution and section 7 of the Electoral
Provisions (Parliament) Act

AND IN THE MATTER of a bye election for
the vacant seat in the Electoral District of
Nukufetau

**REGINA -v- HONOURABLE PRIME MINISTER AND MINISTER RESPONSIBLE
FOR ELECTIONS**

First Respondent

AND

ATTORNEY GENERAL

Second Respondent

EX PARTE

HONOURABLE VETE SAKAIO and six others

Applicants

J Udit and T Finikaso for the applicants
S Talu for the respondents

Written submissions filed: 13 May 2013
Judgment: 24th May 2013

Judgment

[1] One of the two elected MPs for Nukufetau, Lotoala Metia (Metia), died on 21 December 2012 in Fiji and his funeral was held in Tuvalu eight days later. His death resulted in a casual vacancy in Parliament requiring a bye-election. The Prime Minister (PM) is the Minister responsible for elections and, on 4 January 2013, the Ulu Aliko and the Pule Kaupule of the island wrote jointly to the Minister requesting him to arrange a bye-election. On 11 January 2013, the PM replied explaining that he was concerned, at that time, whether it would be possible to conduct such an election in a free and fair manner because of his fear that people would not be able to cast their votes freely and without undue influence from any person or body. He issued no notice of election and that has remained the position.

[2] On 6 February 2013, the Attorney General made application to the High Court under section 131(1) of the Constitution for an advisory opinion as to the meaning of sections 88(2) of the Constitution and section 7 of the Electoral Provisions (Parliament) Act (Case number 1/13). In light of the nature of the allegations upon which the Minister's decision was based, I directed, on 18 February 2013, that the Ulu Aliko should be served and invited to file any submissions he wished. I gave him until 22 March 2013 to do so but, before that date, the seven MPs who constitute the present opposition in the House filed, on 25 February 2013, an application for leave to seek judicial review of the Minister's decision (Case number 2/13). I gave leave, set a timetable and listed both cases for hearing at the next sitting of the High Court which was due to start on 30 April 2013. As the cases involve consideration of precisely the same issues, I directed that they should be listed for hearing together.

[3] As a result of unexpected circumstances arising at the very last minute, the Court sitting had to be cancelled and the listed cases adjourned to the next sitting of the Court. In the light of the urgency of the bye-election and the delays which have already taken place, counsel agreed to deal with this matter on the papers and filed written submissions in accordance with a much abridged timetable. I am grateful to counsel for their co-operation.

[4] In the original application by the Attorney General (Case number 1/13), I have an affidavit from the PM sworn on 6 February 2013 and affidavits in response by the Tao Aliko, Vailopa Auega (Auega), the Pule Kaupule, Fuafanua Faapaologa (Faapaologa) and the remaining MP for the island, Enele Sopoaga (Sopoaga), all sworn on 30 April 2013.

[5] In the application for judicial review (Case number 2/13), the applicants have filed a further affidavit by Sopoaga dated 25 February 2013, an affidavit from Namoliki Neemia (Neemia) on behalf of all the applicants sworn on 28 February 2013 and one from Maatia Toafa (Toafa) dated 15 April 2013. On 3 April 2013, counsel for the respondent in case number 2/13 advised the applicants that he would rely on the original affidavit of the PM, dated 6 February 2013, filed in case number 1/13.

The Facts

[6] The relevant facts are the same for both cases and go back well before the death of Metia. Those facts have been considered in a number of cases before this Court. It is not necessary to go through them in any detail, suffice it to say that there was a serious rift between Metia and members of the Nukufetau community who supported him on the one hand and the Ulu Aliko and at least a substantial number of the members of the Falekaupule and of the island community on the other. That rift was bitter, long lasting and involved, on one side or the other, a very large number of members of the Nukufetau community in Tuvalu, particularly on Nukufetau and Funafuti.

[7] Metia died unexpectedly in Fiji on 21 December 2012 with the result that there was a casual vacancy in Parliament from that date. Following the funeral, the Ulu Aliko, Lipua Talavalu, and Faapaologa, representing the Falekaupule, wrote to the PM on 4 January 2013 stating:

“With greatest respect and humility, we would like to affirm that the island of Nukufetau is ready to hold its bye-election to fill the vacant seat of Nukufetau, caused by the passing away of Hon Lotoala. As provided under the Constitution of Tuvalu and the law, we humbly request if you could confirm the date for the bye-election. Some events that happened on the island may seem to portray that Nukufetau is in disorder.”

The letter then deals with an incident involving the Island Constable and the young men of the island and continues:

“Despite what happened, we affirm that the island of Nukufetau together with its men and women are living in harmony and peace.”¹

[8] The PM replied on 11 January 2013. He briefly summarised the law on bye-elections and continued:

“The bye-election for the island of Nukufetau is one that should be held soon, as stipulated under our laws. In my duty as the Prime Minister of Tuvalu and Minister responsible for the holding of elections in the nation, I deeply respect the laws and make sure that they are being followed. Regarding this bye-election, as Minister responsible, I see it as my duty to ensure that the carrying out of any election in Tuvalu, is conducted in a free and fair manner. Due to

¹ All letters were written in Tuvaluan. Both parties have provided translations which inevitably show some differences in expression but not in meaning. I have used the translations in the letters attached to the PM’s affidavit.

the vast confusions caused by misunderstanding in the roles of the Falekaupule and its relationship to elections and parliamentary system as noted in the case of *Kaupule o Nukufetau v Metia*, HC case No 2/2011, I would like to know and be satisfied that if this bye-election is to be held, the people responsible for conducting these elections understand their duties and functions under the laws. People who wish to contest the election and people who wish to cast their votes be able to do so freely and without undue influence from any person or body.

Rest assured that I want the bye-election for Nukufetau be done as required by law. The government officers responsible for elections and myself have prioritised working on matters needing attention to ensure that the bye-election for the vacant seat of the Nukufetau constituency will be carried out successfully."

[9] The Falekaupule wrote again on 21 January 2013:

"We ... thank you for clarifying the law dealing with elections, in particular your views on the proposed bye-election for the vacant seat for the electoral district of Nukufetau and your assurances of your support for the bye-election to be carried out according to the law. In reference to the concerns raised in your letter, we would like to assure you that we have the same understanding that the bye-election shall be done according to the law. We share the same understanding that a person's right to a free and fair election shall be respected. That applies to those who wish to contest the election and those who wish to cast their votes. We also understand that our laws provide procedures and processes for holding of elections, including provisions for election offences to penalise breaches of the law. While taking into account the rights of each individual to vote and be voted, we also press the right of Nukufetau to have this bye-election soon in order to fill one of its vacant seats in Parliament.

In regards to the other concerns raised by you, Sir, we reaffirm that the people of Nukufetau are willing to cooperate with your office in trying to consult or explain the duties of people responsible for this bye-election likewise the formal procedures associated with it. If there is still doubt on the status of the island, we welcome any arrangements to send additional officers and policemen to the island for the bye-election.

Again, we confirm to you that our island of Nukufetau is prepared to have its bye-election. Five weeks had passed since the vacancy of the seat of Parliament for Nukufetau, and is most unfortunate that you have not determined the date on which this bye-election shall be held. We refer to the bye-election of Nui that was held in August 2012. That bye-election was advertised over the radio for two (2) weeks after the seat of Parliament for Nui was vacant, and the bye-election was held after one month, with you being the Minister responsible for elections. Nukufetau cannot understand why you are treating this bye-election differently. The island of Nukufetau is peaceful."

[10] Similar letters were sent to the PM by Vete Sakaio on 9 January 2013 and by Neemia on 14 February 2013.

[11] In his affidavit, the PM refers to the Nui by-election and explains:

"Although more than six weeks have passed since the death of Mr Metia, I have not issued a notice of bye-election for the electoral district of Nukufetau. In my opinion, it is not practicable to hold a bye-election in Nukufetau at this time because it is likely that a bye-election in that electoral district will not be conducted in a free and fair manner. The following matters, taken together, satisfy me that any election held in Nukufetau at this time will inevitably be tainted with corrupt practices and, in particular, undue influence in the conduct of the electoral process. Incidents of unlawful threats and intimidation by the Falekaupule of Nukufetau have been documented in a number of cases heard before this honourable Court and pending before this honourable Court."

[12] He then deals with the High Court case (No 2 of 2011) referred to in his letter of 11 January 2013, a number of pending cases in which the plaintiffs allege that their employment on the island was unlawfully terminated by the Falekaupule solely because they were supporters of Metia, a purported dismissal of one of the Island Magistrates by the Falekaupule, the suggestion that the EKT pastor was also removed in that way and the incident involving the Island Constable. He concludes:

"Despite the Falekaupule's assurance of respect for the rule of law, the Falekaupule has not taken any steps to reinstate, compensate or otherwise make amends to the victims of its recent unlawful conduct. I believe and am very concerned that the Falekaupule's previous threats against supporters of Mr Metia are continuing to be implemented. As the Minister responsible for elections, I believe that it is my duty to ensure that every election is carried out in a free and fair manner. I am concerned that if a bye-election is held at the present time in the Nukufetau electoral district, it will not be conducted in a free and fair manner. I am satisfied that it is not practicable to call a bye-election for the electoral district of Nukufetau until the above matters which constitute threats and intimidatory practices are resolved."

The Relevant Law

[13] The relevant provisions are found in sections 88 and 89 of the Constitution and section 7 of the Electoral Provisions (Parliament) Act.

Constitution

"88. Holding of Elections

(1) There shall be a general election held after one month but not later than three months after the dissolution of Parliament.²

(2) There shall be a bye-election as soon as practicable after –

(a) the occurrence of any casual vacancy in the membership of Parliament

(b) an Act of Parliament has increased the number of members of Parliament.³

² As amended by the Constitution of Tuvalu (Amendment) (No 1) Act, 2002.

³ As amended by the Constitution of Tuvalu (Amendment) Act, 2000.

89. Electoral Laws

(1) Subject to this Constitution, an Act of Parliament may make provision for and in relation to Parliamentary elections.

(2) An Act of Parliament shall make provision for safeguarding the integrity of Parliamentary elections ...”

Electoral Provisions (Parliament) Act

7. Minister’s Notice of Election

(1) Whenever an election for a member or members of Parliament becomes necessary, the Minister shall issue a notice of election which notice shall specify —

- (a) the electoral district for which the election is to be held;
- (b) the number of vacant seats in each electoral district;
- (c) the name of the Returning Officer for each electoral district;
- (d) a day by which the nominations of candidates for election are to be delivered, which day shall not be earlier than 7 days from the date of the notice and shall not be earlier than the date specified under section 8(d);
- (e) the places and times at which nomination papers shall be delivered to a Returning Officer of any electoral district; and
- (f) a day on which the poll is to be taken in the event of the election being contested, which day shall not be earlier than 21 days from the date of the notice.

The Attorney General’s Application for an Advisory Opinion (No 1 of 2013)

[14] On 6 February 2013, the Attorney General applied to the Court ex parte for an advisory opinion on two questions:

1. Does section 88 of the Constitution and section 7 of the Electoral Provisions (Parliament) Act empower the Minister to not issue a notice of election if he is satisfied that it is not practicable to hold elections in the electoral district in question?
2. If the answer to 1 is "Yes", does the Minister have power to impose conditions on third parties (such as the Falekaupule) in relation to their conduct as a condition precedent to the issue of a notice of election?

[15] Both sections 88 and 7 are couched in mandatory terms; there shall be a bye-election as soon as practicable after the occurrence of any casual vacancy in the membership of Parliament and, whenever a bye-election becomes necessary, the Minister responsible for elections shall issue a notice of election which shall specify the particulars stated in section 7(1) (a) to (f). By section 53(2) of the Interpretation and General Provisions Act, where in a written law the word “shall” is used in conferring a function, it is to be interpreted to mean that the function so conferred must be performed. Both the responsibility to hold a bye-election and the duty to issue a notice of election fall on the Minister responsible for elections.

[16] There is no discretion as to whether or not to perform these obligations but the sections impose no time limits before which performance must take place. The only qualifications are that the bye-election must be held "as soon as practicable" under section 88, that the Minister must issue a notice of election whenever an election "becomes necessary" and that the various procedural steps in section 7(1) (d) and (f) must not be sooner than the periods specified, giving a minimum time of 21 days from the date of the notice to the date of the poll. It is also clear that, as section 7(1)(f) provides that the notice must specify the date upon which polling is to take place and the notice must be issued when the election becomes necessary, the Minister will have to decide the date of the poll at a very early stage in order to issue the notice

[17] However, the real issue raised in the first of the Attorney General's questions is whether, as long as the Minister is satisfied that it is not practicable to hold the election for any reason, he has the power to delay the election indefinitely by failing to issue the notice. To answer that question, the Court must consider two issues; first, whether the Act gives the Minister any right to delay issuing the notice once an election has become necessary and, second, the nature of the duty which is established by section 88(2) particularly the meaning and effect of the phrase "as soon as practicable".

[18] The answer to the first presents no difficulty. The Minister must issue a notice of election whenever an election becomes necessary. The 'trigger' is the necessity for the election and, when, as here, it is to fill a casual vacancy, it becomes necessary on the occurrence of the vacancy – in the present case, the death of the previous Member. The obligation then falls on the Minister to issue a notice of election. It is an immediate obligation. The only qualification, under section 6 of Schedule One of the Constitution, is that it must be done with all convenient speed.

[19] The notice needs a date on which the poll is to take place and so the Minister must decide that also with all convenient speed. From the Minister's point of view, it allows him to delay the date of the poll if there are good reasons why it will not be practicable to take the administrative steps under the Act any sooner. Even if the date of the poll is extended for good reason, the Minister has no power to delay the issue of the notice which must occur when the election becomes necessary. The determining factor in deciding how long the interval before the actual date of the poll is the overall requirement that it must be as soon as practicable.

[20] The Electoral Provisions (Parliament) Act provides, in accordance with section 89 of the Constitution, a sequential scheme or programme for the preparation and holding of an election. As a result, a failure to complete any of the specified steps will delay the remainder as long as the failure to comply continues. I cannot accept that the intention of the phrase "as soon as practicable" in section 88 is properly read as giving the power to delay the whole process indefinitely. Whilst that section places a minimum time of 21 days which must elapse before the poll date, it imposes no upper time limit on the date for the taking of the poll. It is clear that the intention of the legislators when adding the phrase "as soon as practicable" was to ensure that there will be as little delay as practicable in the circumstances at the time. To read its inclusion as being intended to give the Minister power indefinitely to increase delay would clearly lie uneasily with the whole aim of the timetable under the Act.

[21] The phrase "as soon as practicable" is used elsewhere in the Constitution but is not included in the Rules for Interpretation in the First Schedule. Guidance is found in section 4 which provides that the Constitution shall be interpreted and applied consistently with the principles in the preamble and in such a way as to achieve the aims of fair and democratic government. Such an aim must include avoiding for any longer than is absolutely necessary any period when electors are not represented in Parliament. I regard that alone as strongly persuasive that the phrase is intended to limit time rather than to extend it.

[22] Further support for that interpretation is found in section 6 of the First Schedule which provides that , where no time limit is prescribed by the Constitution within which an act is required to be done, the act shall be done with all convenient speed.

[23] The Shorter Oxford English Dictionary defines "practicable" as meaning "capable of being carried out in action" or "feasible" and I am satisfied that is the meaning intended in section 88. The intention of section 88(2) is clearly to implement the aspiration that a bye-election shall be held as soon after the occurrence of any casual vacancy as it can be carried out or it is feasible to hold it. I have already noted that the only time limits in section 7 prescribe the minimum time which must elapse before which the dates mentioned in paragraphs (d) and (f) are set. Whilst the terms of section 88 are intended to ensure that a bye-election is held promptly, the minimum times in section 7 are to prevent the election being called too quickly. They are to ensure adequate time being available for both candidates and electors to prepare for the election; an obvious prerequisite for a fair election.

[24] In summary, the Minister is given no discretion whether or not to issue a notice of election. He is obliged to issue one whenever the election becomes necessary. The requirement to act as soon as practicable applies to the date on which the poll is to be held and so, although there is no upper limit to the length of time before the date of the poll, it must be fixed so it will be taken as soon as it is practicable to do so.

[25] The answer to the first question as worded is "No". The Minister responsible for elections must issue a notice whenever the election becomes necessary and there is no power to delay or omit to do so.

[26] The second question is dependent on an affirmative answer to the first and it is not necessary to consider it further.

[27] The Constitution and the Act set out a procedure for election which, if implemented, will ensure the election will be fairly and freely conducted. Section 89(2) requires that Parliament shall make provision to safeguard the integrity of the election and the provisions of the Act were, no doubt, enacted with that in mind. The Ministers's duty to hold a bye-election as soon as practicable requires those administrative steps in the Act to be organised sufficiently promptly for the bye-election to be capable of being carried out in accordance with the law. Once the Minister has done that, he is entitled to, and should, assume the election will be fairly conducted.

[28] The PM based his decision that it was impracticable to hold a bye-election for the electoral district of Nukufetau, on his conclusion that the problems which beset

that community during the previous year would continue to have an effect on the election and prevent it from being fair and free. It must be borne in mind that, whilst the Minister's responsibility must embrace an overall duty to ensure the election will be fair and free (in an assessment of which, the earlier matters described by the PM would be relevant), it is clear Parliament's intention, as expressed in the Act, is to achieve that by the prompt implementation of the scheme it has mandated under the Act.

[29] The practicality of the election, in terms of a decision of when it is feasible or capable of being carried out, requires consideration of the time and resources necessary to arrange the various administrative steps envisaged in the Act in order to achieve, in all the circumstances, a reasonably practical time limit. The PM himself acknowledged, in the second paragraph set out above of his letter of 11 January 2013, the importance of being able to carry out those steps quickly.

[30] In normal times, the Minister's responsibility to provide a fair and free election is fulfilled by ensuring the statutory processes are in place and capable of effective and timely implementation. If he anticipates widespread instances of undue influence or other illegal acts, his duty is to ensure the government or other responsible authority provides sufficient resources to control it. The PM, in his letter of 11 February 2013, spoke of the need to avoid the problems he foresaw by prioritising such measures and the Falekaupule, in its letter of 21 February 2013, acknowledged the possibility of such additional assistance being needed and gave an assurance of its co-operation. If such steps were necessary, they needed to be implemented quickly in order to ensure a prompt and fair election. Unfortunately the evidence is that no such steps were taken leaving the applicants with the apprehension that the Minister's intention was simply to delay the bye-election indefinitely.

[31] The law provides remedies for election offences and if, after the election has taken place, there is evidence of malpractice, there are procedures to deal with it in the courts. The Minister's responsibility does not require him to be satisfied that there will be no such impropriety before he can proceed with the election nor does the possibility of such actions give him the right to use them or the risk of them, to avoid or delay the implementation of the statutory steps to prepare for the election. That would clearly not comply with the requirement to hold the bye-election as soon as practicable. The test of practicability is whether the necessary administrative machinery to implement the requirements under the Act can be effective in time.

[32] Despite the assurances in the affidavits of Faapaologa, Auega and Sopoaga that conditions on the island will allow a normal bye-election, the PM's fear is that the past actions of the Falekaupule will be repeated so as to prevent a fair bye-election. As Minister responsible for elections, he referred to the need to prioritise steps to counter any realisation of his fear but nothing has been done. The applicants depose that neither he nor any Minister has even visited the island to assess the situation. In the meantime, the members of the Nukufetau community are being denied their constitutional right to elect a second MP to represent them in Parliament.

[33] Before leaving Case number 1 of 2013, I should mention one further submission made by counsel for the Ulu Alikī. He suggests that, as the PM has already delayed the bye election in breach of the Constitution and the Act, it is no

longer necessary or appropriate for the Court to provide an advisory opinion. He has, the submission continues, already decided the meaning and so such advice becomes superfluous. As a result, counsel suggests the application should be struck out arbitrarily.

[34] I do not accept that suggestion. It is based on the assumption repeated more than once in counsel's submissions that the Minister's decision was made solely to delay the bye-election unlawfully. As with so much in the affidavits and, particularly, the submissions before the Court, this is speculation unsupported by evidence beyond the actual fact of the delay so far.

The Opposition MPs Application for Judicial Review (No 2 of 2013)

[35] The applicants seek a review of the Minister's decision, conveyed to the applicants by a letter dated 11 January 2013, to delay the issuance of the requisite notice for the bye-election as required by section 7 (1) of the Electoral Provisions (Parliament) Act and section 88 (2) of the Constitution.

[36] The reliefs claimed in paragraph 7 of the Order 61 statement are:

- (a) A declaration that the respondent Minister acted unlawfully and ultra vires to section 88 of the Constitution by not issuing the notice for and actually holding the bye-election as soon as practicable.
- (b) A declaration that one of the parliamentary seats for the electoral district of Nukufetau is vacant which needs to be filled with a reasonable period of time.
- (c) A declaration that the respondent Minister's decision to defer the bye-election for the electoral district of Nukufetau is unreasonable, unfair, bias and actuated by bad faith or ulterior motive.
- (d) A declaration that the respondent Minister abused his discretion to make an arbitrary and inconsistent decision to defer the bye-election for the electoral district of Nukufetau.
- (e) A declaration that the respondent Minister by deferring the bye-election for the electoral district of Nukufetau has made an error of law and as well as an error of fact and in doing so has frustrated the purpose and thrust of section 88(2) of the Constitution and the right or legitimate expectation of the voters of the electoral district of Nukufetau to be represented by two members of Parliament.
- (f) An order for certiorari to quash the decision of the respondent Minister to defer the bye-election for indefinite or unknown period.
- (g) An order for mandamus directing the respondent Minister to issue notices of the bye-election for the electoral district of Nukufetau and further the bye-election be held within 21 days.
- (h) Costs of this application to be granted on an indemnity basis against the first respondent in person.

[37] The grounds, in paragraph 8, upon which the reliefs are sought are that:

- (a) The respondent Minister acted unlawfully and ultra vires to section 88 (2) of the Constitution.

- (b) The respondent Minister erred in fact in reaching the decision that he did by taking into account irrelevant matters and failing to take relevant matters into account.
- (c) The respondent Minister's decision is wholly unreasonable.
- (d) The respondent Minister's decision is biased and unfair.
- (e) The respondent Minister's decision is manifested with bad faith and improper motive.
- (f) The respondent Minister's decision to defer the by-election indefinitely is an error of law which resulted in the frustration of the purpose and thrust of section 88 (2) of the Constitution and the right of voters of the electoral district of Nukufetau to be represented by two members of Parliament.
- (g) The respondent Minister abused his power and authority delegated to him under section 7 (1) of the Electoral Provisions (Parliament) Act. In doing so he has acted unfairly and in breach of legitimate expectations of the electorate, Members of Parliament and at large the citizens of Tuvalu.
- (h) The respondent Minister's decision is both arbitrary and inconsistent.

[38] I am aware of the applicants' anxiety to resolve this issue but their case is not helped by such repetitive pleading. The reliefs sought in paragraphs (f) and (g) are remedies properly sought. The declarations in paragraphs (a) to (e) inclusive state the basis upon which they are claimed and would add little to a grant of those orders. Similarly the grounds on which the relief is sought add little to the matters pleaded in 7 (a) to (e).

[39] I intend only to deal with the applications for certiorari, mandamus and costs. The remaining matters are all relevant to the decision whether to issue the prerogative writs and I have so considered them but I am not satisfied the declarations sought are necessary or that, if any was made, it would add anything to my decision on certiorari or mandamus.

[40] It is important to remember that the decision from which relief is sought was that stated in the PM's letter of 11 January 2013 in which he was maintaining that, as a result of the "vast confusions caused by misunderstanding in the roles of the Falekaupule and its relationship to elections and parliamentary system", he wished "to know and be satisfied that if this bye-election is to be held, the people responsible for conducting these elections understand their duties and functions under the laws. People who wish to contest the election and people who wish to cast their votes be able to do so freely and without undue influence from any person or body". Less than a month later, he applied for the High Court opinion on the meaning of sections 88 and 7.

[41] At that time, the period which had elapsed since the casual vacancy arose was approaching two months. Before the Court received the submissions it had requested in that application, this action for judicial review was filed. That led to further delay to allow the necessary timetable for affidavits and submissions and the Court's decision to hear both cases together. The combined effect of the original decision and these court actions is now a total delay of five months since the casual vacancy arose from the death of Metia.

[42] The decision conveyed in the PM's letter of 11 January 2013 did not specifically state whether he intended to delay the election indefinitely. The filing of the

application for judicial review was clearly based on the applicants' concern that the decision, in reality, was to delay the by-election, if necessary, until the next general election. That fear of a continuing delay was well founded as demonstrated by the statement in the PM's affidavit that "I am concerned that if a bye-election is held at the present time in the Nukufetau electoral district, it will not be conducted in a free and fair manner. I am satisfied that it is not practicable to call a bye-election for the electoral district of Nukufetau until the above matters which constitute threats and intimidatory practices are resolved". The undisputed evidence of the applicants is that there has been no step taken by the Minister to address those problems.

[43] It is clear from the PM's letter and affidavit that his consideration of the events of the previous year left him with a fear that the Falekaupule would use unlawful or improper means to influence the way in which electors cast their votes or even to discourage them from voting altogether. Those fears were, to some extent, supported by the findings of this Court both in the case he cited and in a defamation action involving the same parties. The latter is the subject of appeal and so the PM was right to refrain from referring to it but the facts found in that judgment are matters in his knowledge which he is entitled to consider relevant to his assessment of whether or not it is practicable to hold a bye-election.

[44] The result of Metia's death is that the government and the opposition have an equality of members in the House and, consequently, the result of the bye-election may lead to the government losing the majority it has held since the last general election. The affidavits and submissions of the applicants strongly contend that is the true reason for the PM's delay in issuing the notice of election and their fear is that he sees it as in his interest to maintain that situation indefinitely in order to remain in office even until the next General Election which is due next year. It is from this, that the suggestions of improper motive and bias arise.

[45] I can deal with those shortly. Suggestions and accusations between politicians of moral or political impropriety are not unusual in the political sphere but they can only have a place in court decisions when they are supported by credible and sufficient evidence to prove they have sufficient factual substance. In the present case, the underlying reasons for suspicion and mistrust by both sides can be easily identified. The history of events in Tuvalu in respect of Nukufetau over more than two years have undoubtedly provided fertile ground in which suspicion, speculation and antipathy can flourish. Those suspicions have resulted in serious allegations against the PM in the affidavits of the applicants. Such allegations are given further prominence in counsel's submissions and include allegations which go beyond even the allegations in the affidavits upon which counsel's submissions should be based. I am struck by the absence of any evidence to take those allegations beyond mere speculation and they should not have been made without it, particularly in the submissions of counsel for the applicants. Many apparent facts stated in the affidavits of both the PM and the applicants are no more than assertions of the deponent's suspicions about the bona fides of his or their opponents. Unfortunately for both sides in this action, the evidence is of past events with little, apart from the bald fact of the delayed notice of election, the present balance in Parliament and pure speculation, to advance or deny the assertion of mala fides.

[46] In his submissions, counsel for the applicant also suggested that, as the bye-election could change the balance of power in Parliament, the PM stood to gain from

the delay and should have disqualified himself from making decisions about the timing of the election. I cannot accept that contention. There can be no doubt that a Prime Minister and, indeed, every elected member of the House will have an interest in a bye-election and its possible effect on the balance of Members. When Parliament enacted the electoral laws, it would have been aware of the potential interest of the government in any election yet chose to place the responsibility on the designated Minister. The PM, as Minister responsible, was performing the duty so cast upon him and I do not consider that, in so doing, he would have reason to disqualify himself unless he had some additional personal interest which went beyond the consequences of an unfavourable bye-election result.

[47] I do not intend to make any of the declarations in paragraph 7(a) to (e). My finding in case number 1 of 2013(above) covers the legal basis of those declarations and it is unnecessary to refine it further to fit the various aspects sought in those declarations.

[48] The allegations that the Minister's decision was biased and unfair and actuated by bad faith and improper motive are not proved and I shall confine my consideration of the application for writs of certiorari and mandamus to correct the Minister's decision not to proceed with the bye-election on the grounds that it was ultra vires sections 88(2) and 7 and/or that it was unreasonable.

[49] As has been stated, the reason given by the PM for his decision to delay the election by failing to issue a notice was his belief that the practicability of holding the election extended to his conclusion of whether it would be fairly and freely conducted. That was undoubtedly a relevant matter in his role as Minister responsible for overseeing the whole electoral process and I accept his concern was genuine but there is no evidence before this court to suggest that his fears would be realised if the election was arranged in the manner prescribed in the Act. On the contrary, there is the evidence in the affidavits of the Ulu Aiki and the others that the island is confident of holding a fair and free election. They do not attempt to hide from the unfortunate past events but, as the customary leaders of the island community, give their assurance that the election will be properly carried out by secret ballot. The court has been given no evidence to suggest there has been any attempt by the PM or other senior member of the government to evaluate the accuracy or substance of that assurance. I accept that the Minister's action was based on his misunderstanding of the relevance of such matters to his duties under the Act but it was that misunderstanding which I am satisfied rendered his decision unreasonable.

[50] The test of unreasonableness, or irrationality, is that the impeached decision is so unreasonable that no reasonable decision maker, properly directing himself as to the law, could have arrived at it; Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 KB 223. Lord Greene MR when pointing out that the word unreasonable had been used in a sense which suggested different grounds upon which the court may review a decision, explained:

“The court is entitled to investigate the action [of the decision making body] with a view to seeing whether or not [it] has taken into account matters which [it] ought not to have taken into account, or, conversely has refused to take into account or neglected to take into account matters which [it] ought to have taken into account.

... The power of the court to interfere in each case is not as an appellate authority to override a decision of [the decision making body], but as a judicial authority which is concerned, and concerned only, to see whether [it] has contravened the law by acting in excess of the power which Parliament has confided in it."

[51] A substantial part of the applicants' submissions is devoted to challenging the accuracy or truth of the Minister's assessment of the circumstances upon he based his concerns over the likelihood of interference with the fairness of the election. Judicial review is of the manner in which the impugned decision was made. The correctness of the Minister's determination of those issues is not a matter for the Court. It has long been accepted that, in reviewing a decision, the court will not interfere with the decision merely because there has been an error of fact because it should not take from the decision maker the judgment and discretion given him to determine the relevant facts.

[52] If section 88 is read with the provisions of the Electoral Provisions (Parliament) Act it is clear, in my opinion, that the practicality of any particular election date is intended principally to refer to the provisions of the Act. Section 89 of the Constitution empowers Parliament to make the necessary practical arrangements for the election and it has done so in the Act. The overriding intention of both the Constitution and of the Act is to ensure a fair election and it was clearly intended by Parliament that, if all those provisions are obeyed, that will be achieved.

[53] I accept that the Minister believed that it was necessary to remove any risk of improper conduct by some members of the community or the Falekaupule before he could accept the election was a practical possibility. Where I am satisfied he went wrong was to include the need first to correct any such problems as a part of his assessment of the requirement to hold the election as soon as practicable. Despite his reference to the need to prioritise any steps required to solve or contain such problems, he simply left them unresolved, delayed the issue of a notice of election and took no further step to make it practicable to hold the election. His assessment of the likelihood of undue influence or other impropriety was clearly a relevant consideration for him as part of his overall responsibility as Minister responsible but it was not an impediment to the practicability of holding an election promptly.

[54] His inclusion of such considerations as necessary prior conditions to his decision that an election was practicable meant he had misdirected himself on the law. Had he properly directed himself on that aspect of the law, he could not have arrived at the decision he did. However, he did so advise himself and, as a result, has allowed extraneous matter to influence his decision. That decision was to delay the issue of a notice of election; a power which was not open to him under sections 88 or 7. As such, his decision was unreasonable in *Wednesbury* terms.

[55] I therefore order a writ of certiorari shall issue to bring the decision into this Court in order to quash it which I so do..

[56] The applicants also seek an order of mandamus. Counsel for the respondents does not challenge the applicants' contention that, in the event that the application for certiorari succeeds, mandamus should follow. In many cases where the respondent is a government minister or officer or a public body, it is considered unnecessary to order mandamus as such bodies will accept the decision of the court

and ensure the challenged decision is corrected accordingly. I have no reason to consider this case would be any different, especially as the Minister had already chosen to seek the Court's opinion on this issue in action number 1 of 2013, but the length of the delay has resulted in the electors of Nukufetau being prevented from exercising their constitutional right to elect, and be represented by, a second member of Parliament. That must be corrected as soon as the arrangements can be put in place and I consider this is a case where the applicants have a right to be sure that there will be no further delay than is absolutely necessary and so I shall order mandamus in terms which will obviate unnecessary further delay.

[57] As has already been stated, section 7 of the Act imposes minimum time limits but give no direct guidance on the maximum time within which the election is to take place. The only limit is provided by the overall stricture in section 88 that the bye-election shall be held as soon as practicable. Reference has already been made to the PM's assurance that government officers have prioritised work on matters needing attention in order to ensure the bye-election will be carried out successfully. There is no evidence that any such work has taken place and, in light of the PM's assurance, I assume none has been found to be necessary. Therefore I consider that it is desirable to include a time frame to restrict further delay.

[58] Reference has been made to the recent Nui bye-election to show the time in which it is practicable to hold such an election and I find that a useful guide. I order that the Minister responsible for elections shall issue the notice of election for the casual vacancy in the electoral district of Nukufetau in accordance with the terms of section 7 of the Act within five days from the date of delivery of this judgment in open court. I further order that the date for the lodging of nominations under section 7(d) shall be no less than seven days nor more than nine days from the date of the notice of election and the date for the poll under section 7(f) shall be no less than 21 days nor more than 28 days from the same date of the notice.

[59] I reserve any order on costs to the next sitting of the High Court. Should both parties agree to have costs dealt with on written submissions only, I give leave so to apply and I shall set a timetable for submissions.


Orders

[61] HC Civil case no. 1 of 2013

1. The first question, "Does section 88 of the Constitution and section 7 of the Electoral Provisions (Parliament) Act empower the Minister to not issue a notice of election if he is satisfied that it is not practicable to hold elections in the electoral district in question?" is answered No.
2. The second question, being dependent on an affirmative answer to the first question, is not pursued.
3. Costs reserved to the next sitting of the High Court unless counsel agree that they should be decided on written submissions only.

1. The Court declines to make the declarations sought in paragraphs (a) to (e) of the originating summons dated 18 March 2013.
2. The Court orders the issue of a Writ of Certiorari to bring the decision by the Minister responsible for elections to defer the bye election to fill the casual vacancy in the electoral district of Nukufetau arising from the death of Hon Lotoala Metia into this Court to quash it and does so quash it.
3. The Court orders the issue of a Writ of Mandamus ordering the said Minister responsible for elections to issue a Notice of Election for the holding of a bye election in the electoral district of Nukufetau to fill the casual vacancy arising from the death of Hon Lotoala Metia such Notice to be issued within five days from the date of the delivery of this judgment in open court.
4. It is further ordered that the date specified in the said Notice of Election for the lodging of nominations under section 7 (1)(b) of the Electoral Proceedings (Parliament) Act shall be not less than seven days nor more than nine days from the said date of the delivery of this judgment in open court and that the date specified in the said Notice of Election for the poll to be taken in the event that the election is contested under section 7 (1)(f) of the said Act shall be not less than 21 days nor more than 28 days from the said date of delivery of this judgment in open court.
5. Costs reserved to the next sitting of the High Court unless counsel agree that they should be decided on written submissions only.

Delivered in open court this 24th day of May 2013


Gordon Ward
Chief Justice



Delivered on the 24th day of May 2013 on Funafuti by the Senior Magistrate Afele Kitiona.