

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

CV 20/11

UNDER	Article 21, Niue Constitution
IN THE MATTER	Application for a Declaratory Judgment
BETWEEN	TOGIA SIONEHOLO Applicant
AND	AHOHIVA LEVI TOKE TALAGI Respondents

Hearing: November 2011

Judgment: 27 February 2012

DECISION OF HIS HONOUR JUSTICE W W ISAAC

[1] The applicant, Togia Sioneholo, is a member of the Niue Assembly. He seeks an order declaring the Toi village constituency seat (Toi) to be declared vacant, pursuant to section 9 of the Niue Assembly Act 1966 (the Act) for two reasons.

[2] First, the swearing in of the elected member for Toi in Auckland New Zealand in September 2011 did not satisfy the requirements of Article 21 of the Constitution and therefore meets the requirement set out in section 9(a) of the Act for vacancy to be declared.

[3] Second, the member for Toi has not attended any meetings of the Assembly and therefore meets the requirements under section 9(e) of the Act.

Background

[4] In the General Elections in May 2011, the incumbent member of Parliament for Toi village, Mr Dion Paki Taufitu, was re-elected. However, because of an injury

sustained during a village cricket match in April, the member had been required to fly to New Zealand for medical attention before the election results were published on 9 May 2011. When this matter was heard in November 2011, the member was still awaiting surgery and the Court was told he had been declared unfit to travel by his doctors.

[5] In an effort to fulfil the requirements that a Member of Parliament take the Oath of Allegiance, as specified in Article 21 of the Constitution, the member for Toi took the oath before the Speaker and several other members of the Assembly in Auckland, New Zealand on the 4th September 2011.

[6] Because the member has had to remain in New Zealand since the elections, at the time submissions were filed he had not attended any of the Niue Assembly meetings.

Law

[7] Several Articles of the Constitution are relevant to this case. These are:

20 Speaker of the Niue Assembly

- (1) The Speaker of the Niue Assembly shall be elected to that office by an absolute majority of the members present and voting at a meeting of the Niue Assembly.
- (2) Only a person who is qualified for election as a member of the Niue Assembly may be elected as Speaker.
- (3) If any person elected as Speaker is, at the time of that election, a member of the Niue Assembly, he shall vacate his office as a member when he enters upon the duties of the office of Speaker.
- (4) The election of the Speaker shall take place, before the despatch of any other business, at the first meeting of the Assembly after each general election, and, at a meeting of the Assembly called for that purpose, as soon as possible after any vacancy in the office of Speaker has occurred.
- (5) Before a person who has been elected Speaker enters upon the duties of his office, he shall take and subscribe before the Clerk of the Niue Assembly at a meeting of the Assembly the Oath of Allegiance prescribed in Article 21 of this Constitution, and the provisions of that Article shall apply with the necessary modifications as if the references therein to a member were a reference to the Speaker.

- (6) The Speaker may resign his office by writing under his hand addressed and delivered to the Clerk of the Niue Assembly, and shall vacate his office –
- (a) On the entry into office of a new Speaker elected when the Assembly first meets after a general election; or
 - (b) If he ceases to be qualified for election as a member of the Assembly; or
 - (c) If he becomes a candidate at any election of a member or members of the Assembly.
- (7) If at any meeting of the Assembly the Speaker is absent or the office of Speaker is vacant, the members of the Assembly present at that meeting shall elect one of their number, not being a Minister, to preside over that meeting until the Speaker is again present, or, as the case may be, until a Speaker has been elected and has entered upon the duties of his office.
- (8) If, at any time when the Assembly is not meeting, the Speaker is, by reason of illness or absence from Niue, temporarily prevented from performing his functions, or the office of Speaker is vacant, then, until the Assembly again meets, or, as the case may be, the Speaker is again able to perform his functions, those functions shall be performed by a member of the Assembly, not being a Minister, who has presided over a meeting of the Assembly pursuant to subclause (7) of this Article. If more than one member of the Assembly is so qualified and is available to perform the functions of the Speaker, those functions shall be performed by the member who most recently presided over a meeting of the Assembly, pursuant to that subclause.
- (9) If it appears that no person is, for the time being, qualified and available to perform the functions of the Speaker –
- (a) A meeting of the Assembly shall be called as soon as possible, and the Clerk of the Niue Assembly shall perform such of the functions of the Speaker as are required to be performed for the purpose of enabling that meeting to be held, and the provisions of Article 22(6) of this Constitution shall not apply to that meeting; or
 - (b) In any case where the Assembly has been dissolved and the ensuing general election has not taken place, a meeting of those persons who were members of the Assembly immediately before its dissolution shall be called as soon as possible for the purpose of electing one of their number to perform the functions of the Speaker until the Speaker is again able to perform his functions, or, as the case may be, the new Assembly first meets; and the Clerk of the Niue Assembly shall do everything necessary to ensure that the meeting is called and to certify to the result of the election. The person elected shall, for the purpose of subclauses

(7) and (8) of this Article, be deemed to be a person who has presided over a meeting of the Assembly.

(10) Every document, including the certificate on any Bill, signed by the Speaker in the performance of his functions shall be countersigned by the Clerk of the Niue Assembly, and, where pursuant to this Article, any such document or certificate is signed by a member performing the functions of the Speaker, it shall be so stated on the document or in that certificate.

21 Except for the purpose of enabling this Article to be complied with and for the election of a Speaker, no member of the Niue Assembly shall be permitted to sit or vote therein until he has taken and subscribed the following oath before the Speaker namely: I,, swear by Almighty God that I will be faithful and bear true allegiance to Her (or His) Majesty [*Specify the name of the reigning Sovereign, as thus: Queen Elizabeth the Second*], Her (or His) heirs and successors according to law, and that I will justly and faithfully carry out my duties as member of the Niue Assembly. So help me God.

22 Procedure of Niue Assembly

(1) The Niue Assembly shall meet at such places and at such times as the Speaker, acting on the request of the Premier, from time to time appoints in that behalf: Provided that, if more than 6 weeks has elapsed since the time of the last meeting of the assembly, any 4 or more members of the Assembly who are not Ministers may request the Speaker to appoint a place and time for a meeting of the Assembly, and the Speaker shall appoint a place and time in that behalf, such time to be not earlier than 5 days later nor than 10 days after but excluding the date of the making of the request.

(2) The Speaker shall preside at every meeting of the Niue Assembly at which he is present.

...

(6) Subject to Article 20(9)(a) of this Constitution, no business shall be transacted at any meeting of the Niue Assembly if the number of members then present, including any member presiding in place of the Speaker, is less than 10.

[8] Section 9 of the Niue Assembly Act 1966 is also relevant. It states:

9 How vacancies created

The seat of a member shall be declared to be vacant by the Chief Electoral Officer by public notice under his hand –

- (a) If he fails to take the Oath of Allegiance; or
- (b) If on an election petition the Court declares his election void; or
- (c) If he dies; or
- (d) If he resigns his seat; or
- (e) If, on 3 consecutive sitting days, the member fails, without the permissions of the Speaker, to attend the meetings of the Assembly or of any committee of the Assembly; ...

Applicant's case

[9] The applicant submits that the swearing in of the member of the Toi constituency in Auckland, New Zealand, was not performed in accordance with the requirements of Article 21 of the Niue Constitution and consequently the seat can be declared vacant under s 9(e) of the Niue Assembly Act 1969.

[10] While Article 21 is silent as to where a swearing in must take place, there is long established practice and convention that has been in operation since the enactment of the Niue Constitution. These conventions are strongly influenced by the processes of the Westminster parliamentary system, which the Niue model of government is based on.

[11] Convention has established that the swearing in takes place in Niue at a meeting of the Niue Assembly where the Speaker administers the oath to the incumbent member. The applicant doubts that it was ever conceived that a meeting of the Niue Assembly could ever be convened anywhere other than Niue because it is so fundamental to the sovereign standing of the country following decolonisation.

[12] The applicant submits that the powers of the Speaker are restricted to within the jurisdiction of Niue, and more specifically, to within the premises of the Assembly. The meeting in Auckland was not only beyond the Speaker's jurisdiction, but proper notice was not given to call a meeting of the Assembly, irrespective of it being held in Auckland. With only two members and the Speaker being present, quorum was not met at that meeting either.

[13] It is further submitted that the duties of the Speaker, as set out in the Constitution, must be viewed in the 'positive' form, and not the negative, because the Constitution sets out what the Speaker can do, not what they cannot. This is an important distinction, because if interpreted in the 'negative', there would essentially be nothing in the Constitution that they could not do. The applicant states it would be fundamentally wrong to bestow so much power on this position, particularly since the Speaker is not an elected member of Parliament.

[14] There are well founded principles of constitutional interpretation that allow the Constitution to be read as a whole to aid in interpreting a particular article. The article that directly precedes article 21 refers to the manner in which the Speaker is sworn in, which necessitates the Speaker swear the oath as set out in Article 21, before a meeting of the Assembly.

[15] An additional convention is that the swearing in be carried out at a public ceremony. The meeting in Auckland was performed at a private ceremony, contrary to the principle of transparency, which is integral to good governance.

[16] The ill health of the member for Toi also brings into question his ability to perform his duties and responsibilities. This is further complicated by the fact that he is not present in Niue, but remains in Auckland, and has not attended any meetings since the election in May. The member is meant to be representing his constituency but he is incapable of doing so.

[17] The applicant submits that even in the event that the Auckland swearing in is deemed valid, it was carried out too late because the oath should have been taken either at the first meeting of the Assembly, or within a reasonable time period thereafter. While there is no prescribed time limit for the swearing in to take place, the applicant asserts that the language of Article 22 of the Constitution establishes a reasonable time period to be approximately 18 weeks, or 3-4 months or three meetings of the Assembly – whichever is the earliest option. This is on the basis that Article 22 allows for member's to request a meeting to be called if more than six weeks has elapsed since the last meeting was called.

[18] The Assembly has sat five times between May and October and the member has not attended any meetings. Consequently s 9(e) can be invoked and the seat declared vacant. The applicant feels that it would be absurd to consider that the member could take a leave of absence for an unlimited amount of time, because that could enable them to take three years leave of absence, when their term itself is only three years long.

[19] Although this provision allows for the Speaker to give permission for a member to miss a meeting, the applicant submits that the Speaker's discretion is limited to a reasonable period of time, and that the Toi member has missed an unreasonable number of sitting days and therefore his seat should be declared vacant.

Respondents' case

[20] The respondent submits that there is no requirement under Article 21 that the taking of the oath be at a meeting of the Assembly, nor that the oath taking, or the Speaker's powers to take the oath, be restricted geographically to Niue. As such the respondent was properly sworn in, in accordance with Article 21.

[21] It is submitted that it is inappropriate and unnecessary to make inferences about whether or not the oath taking must take place in Niue. If the Constitution is not explicit, then that is what was intended. The articles of the Constitution should be read separately, unless there is specific cross-reference made.

[22] As such the respondent does not contest that there was no meeting of the Assembly called for the oath taking in Auckland, because this was unnecessary on the wording of Article 21.

[23] Duties of a member are only imposed on them once the oath has been sworn. Since the member was not sworn in until September, this is the point from which they assume their responsibilities.

[24] The respondent submits that parallels can be drawn between the Speaker's powers and those of the judiciary which allows them to make court orders from New Zealand. As such the Speaker's powers should not be limited geographically.

[25] The constitution does not set a time limit for the oath taking. It is merely a precondition for speaking in the Assembly. The respondent does agree that time is controlled by s 9(e) and the requirement that no more than three consecutive meetings can be missed without permission.

[26] However Standing Order 28 requires that written notice of a meeting must be given five working days before the meeting, in a way that will ensure the Member is duly informed of the meeting. The respondent questions whether this has been complied with because notice of the first two meetings and of the fourth and fifth meetings, was delivered to his residence in Toi village, while notice of the third meeting was only delivered to his folder at

the Office of the Clerk. The respondent submits that the member was not duly notified of the third meeting, and as such cannot be deemed absent for the purposes of the Act.

Affadavit of the Speaker

[27] The Speaker of the Niue Assembly, Hon. Ahohiva Levi (the Respondent), has also filed an Affidavit with the Court. This states that he took up office on the 16th May 2011, at the first meeting after the General elections. At that meeting all the members swore their oath of allegiance, except for the member for Toi constituency, Mr Taufitu. This was when the Speaker became aware of the member's absence.

[28] The second meeting was scheduled for the 15th June and the papers were delivered to each of the member's residences. A third meeting was called for the 3rd August, but in this instance the papers for Mr Taufitu were filed on his member's file in the office and not delivered to his residence. Mr Taufitu was absent for both meetings.

[29] On the 4th August the Speaker wrote to the Acting Premier of his intention to inform the Chief Electoral Officer to declare the Toi constituent seat vacant, as per s 9(e) of the Niue Assembly Act 1966.

[30] On the 5th August the Speaker received a letter from the Acting Premier saying that he had phoned Mr Taufitu on the 4th August. The following day Mr Taufitu rang the Speaker and explained to him that he was unhappy with his current situation in terms of his ill health and responsibility as member for Toi.

[31] The Speaker reminded Mr Taufitu that he was yet to take the oath of allegiance, and furthermore, that he had not sought leave from the Speaker as required by the Standing Orders. He was then informed that the Assembly was meeting on the 24th August and that would be the opportunity for Mr Taufitu to fulfil his constitutional obligations because the situation could not be tolerated indefinitely. Mr Taufitu did not yet have medical clearance to travel, but told the Speaker that he would consult his doctor and get back to him. The Speaker sent Mr Taufitu a letter, dated 5th August, to confirm their phone conversation, delivered to him in Auckland by the Hon. Sipeli.

[32] On the 9th August the Speaker sought legal advice from the Government solicitor as well as Professor Tony Angelo, Niue's Constitutional advisor, who was visiting Niue on the 26th August. The Speaker asked whether the constitution allows for the oath to be taken anywhere, given that article 21 is silent as to the location of the oath

taking, only specifying that it must be carried out before the Speaker. Professor Angelo's verbal advice was that the Speaker should go ahead with the oath taking while in Auckland, but to do so in the presence of other members of the Assembly who would also be in Auckland at the time.

[33] Subsequently Mr Taufitu was sworn in by the Speaker on 4th September 2011.

File Note of the Speaker 4th September 2011

[34] There is also a file note from the Speaker dated 4th September which records a discussion between himself and Mr Taufitu from the 3rd September 2011.

[35] The file note records that a discussion was held between Mr Taufitu and the Speaker, where Mr Taufitu was reminded of their respective legal obligations, despite these being circumstances beyond his control. While Mr Taufitu was anxious to return to Niue and to fulfil his responsibilities, it was unlikely that he would be able to for a few more months. He asked for continuation of his fortnightly salary to assist in his welfare while awaiting surgery. The Speaker sympathised with his situation and granted him permission to remain in Auckland.

[36] Mr Taufitu was informed of the Speaker's intention to swear him in the following day, in the presence of members who were also present in Auckland. Mr Taufitu agreed, but requested that the Assembly should be given the privilege of learning about the swearing in from the Speaker and not from the Press. This was agreed to by the Speaker.

Discussion

[37] The first issue to determine is whether the swearing in of the elected member for Toi, Mr Dion Taufitu, complies with the requirements of Article 21 of the Constitution.

[38] The applicant maintains that there was non-compliance essentially because the swearing in took place in Auckland and not before the Assembly in Niue. He also submits that the swearing in should take place within a reasonable time of election being no more than 18 weeks or three meetings of the Assembly.

[39] The Respondent submits that there are no geographic restrictions imposed on the Speaker as to where he is required to administer the oath, and no time restrictions.

[40] Article 21 is silent on both where the oath should be administered and when it should be administered following an election.

[41] The applicant acknowledges this but submits that to properly understand Article 21 it must be read in the context of the whole Constitution. Also, one should consider the traditions and conventions of the Westminster system upon which the Niuean parliamentary system has been modelled.

[42] I agree with the applicant on both counts. The Westminster system is based on well established ceremony, with conventions and traditions that span generations. The fundamental aspect of such a swearing in is that members are sworn in during the first sitting of the House. In England, and in most Commonwealth countries, the Speaker is elected first and then proceeds to swear in the members. Most of this process is adhered to by convention and tradition and not legislative prescription.

[43] This is the system that has operated in Niue since independence in 1974.

[44] The Speaker is elected first, in terms of Article 20(A), at the first meeting of the Assembly after a general election. The Speaker then takes the Oath as set out in Article 21 of the Constitution.

[45] On the 16th May 2011 the first meeting of the Assembly was held after the general election, and at that meeting the Speaker was elected and sworn in, as were all other members with the exception of the member for Toi.

[46] In terms of the Affidavit of the Speaker, this raised concern, and Mr Taufitu was contacted and reminded of his legal obligations. The Speaker also wrote to the Acting Premier of his intention to inform the Chief Electoral Officer to declare the seat for Toi vacant.

[47] Clearly there were major concerns raised by the Speaker for the non-compliance with conventions of the Westminster system.

[48] When these conventions are considered in conjunction with the Constitution as a whole the clear picture emerges.

[49] Article 20 sets the process in place for the election of the Speaker and his swearing in in terms of Article 21. This takes place before a meeting of the Assembly in terms of Article 22 as requested by the Premier. This meeting of the Assembly is as

soon as possible after the election and requires in terms of Article 22(6) at least 10 members of the Niue Assembly present including the Speaker. Also as set out in Article 22(1), any meeting of the Assembly is called at the request of the Premier, and in terms of Standing Order 28 written notice of the meeting is to be given five working days before the meeting to the members.

[50] Therefore when Article 21 is read in conjunction with these other provisions, the scene is set for the swearing in ceremony for the Speaker, and in my view, the members.

[51] The process set out above was followed for all the members except the member for Toi.

[52] In that member's case the Speaker, as stated in his affidavit and file note, was concerned. On the advice of Professor Angelo, he invited as many members as possible to a swearing in in Auckland. This took place on the 4th September 2011, some four months after the election.

[53] There was no official notice; not all members were invited, even unofficially; there was no meeting of the Assembly; there was no direction from the Premier to call the meeting in Auckland; only two members and the Speaker attended; and the swearing in took place in Auckland, not in Parliament buildings of Niue before the Assembly. Furthermore the ceremony took place four months after the election and after three meetings of the Assembly which were missed by Mr Taufitu. This adds weight to the proposition that to be an effective member of the Assembly you should be sworn in at the first sitting of the Assembly. If you are not so sworn, then your election to represent your village is of no effect.

[54] As a result I am of the view that what took place was not a swearing in as contemplated by the Constitution. In fact the process contemplated by the Constitution and the conventions followed by the Niuean government were seriously abused.

[55] Accordingly I find that the swearing in of the member for Toi to be invalid and in terms of Section 9(a) find that the seat for Toi should now be vacated.

[56] As I have made this finding I need not consider the applicants second ground that the member for Toi has not attended any meeting of the Assembly and therefore satisfies Section 9(e) Niue Assembly Act 1966.

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

Signed on the 27th day of February 2012.

A handwritten signature in black ink, appearing to read 'W W Isaac'.

W W Isaac
JUSTICE OF THE HIGH COURT