Koshiba v. Remeliik, 1 ROP Intrm. 65 (Tr. Div. 1983)

JOSHUA KOSHIBA, et al.,
Plaintiffs,

v.

HARUO I. REMELIIK, et al.,
Defendants.

CIVIL ACTION NO. 17-83

Supreme Court, Trial Division
Republic of Palau

Memorandum opinion
Issued: January 31, 1983

BEFORE: ROBERT A. HEFNER, Associate Justice.

On the long road the Palauan people have taken to determine their future political destiny, their next decision is perhaps their most important one. After many years of discussion and negotiation a "Compact of Free Association" (COMPACT) was signed by representatives of the Republic of Palau and the United States of America on August 26, 1982.[1]

Without going into detail, the document spells out a political relationship between the two countries for a number of years in the future and assures financial assistance for the Republic of Palau from the United States over a period of time.

The Preamble of the Compact recognizes, *inter alia*, the present and future sovereignty of the Republic of Palau, its right to self-determination and that the approval of the entry of (the Republic of Palau) into their Compact of Free Association by (its people) constitutes an exercise of their sovereign right to self-determination. Preamble, page iii, paragraph 6, Compact of Free Association.

Article I of the Compact spells out the procedure for its approval. Three general steps are outlined. First, the ⊥66 Government of Palau must approve the document in accordance with its constitutional processes. Second, a plebiscite shall be held pursuant to Section 412 of the Compact. This includes setting a date for the plebiscite, providing for a free and voluntary choice by the electorate through informed and democratic processes, and conducting the plebiscite under uniform, fair, and equitable standards. Third, the Government of the United States must approve the Compact in accordance with its constitutional processes.

Accordingly, after the execution of the Compact by the Republic of Palau and the United

[1] The Compact also includes the same basic political relationship for the Republic of the Marshall Islands and the Federated States of Micronesia. For the purposes of this litigation, the court need only concern itself with the provisions as they apply to the Republic of Palau.

States on August 26, 1982, the next step was to hold the plebiscite. Senate Bill No. 259 was introduced in the Olbiil Era Kelulau (OEK) with the express purpose of providing for the referendum and plebiscite and a program of political education on the Compact.

This bill, after various Senate and House drafts, was enacted into law as Republic of Palau Public Law (RPPL) No. 1-43 after the President of the Republic of Palau signed it on November 9, 1982. After the law became effective, one election date was aborted and presently the plebiscite is set for February 10, 1983 which is the last date allowable under the provisions of Section 2(a) of RPPL No. 1-43.

On January 21, 1983, the plaintiffs, both registered voters, filed this lawsuit to enjoin the holding of the election on that date. The thrust of the plaintiffs' action centers on the proposed official ballot to be used by the electorate. It is alleged that Proposition I(B), as it appears on the ballot, does not comply with RPPL No. 1-43 in that it is misleading, creates confusion, and is an inaccurate description of the proposition to be voted on in the plebiscite. Additionally, the plaintiffs assert that the Palauan version of Proposition I(B) is inaccurate and inherently inconsistent.

The pertinent part of RPPL No. 1-43, Section 5, states:

Section 5. Form of Ballot. The ballot shall appear substantially as follows:

Proposition One

Do you approve of Free Association as set forth in the Compact of Free Association?

/____/ Yes
/____/ No

Do you approve of the Agreement concerning ⊥67 radioactive, chemical and biological materials concluded pursuant to Section 314 of the Compact of Free Association?

/____/ Yes
/____/ No

.....

The wording for Proposition One in the ballot at issue states (In English and Palauan):

PROPOSITION ONE (KOT EL LULDASUE)

THE COMPACT WILL BE APPROVED BY A MAJORITY OF THE VOTES CAST.

A COMPACT A KIREL MO MENGAI A KENGEI ER NGII ERA OBDOIS EL SENGKYO.

(A) Do you approve of Free Association as set forth in the Compact of Free Association?

(A) Kau kekongei ra Mimokl el Deleuill el kldmokl era elsel a Compact ra Mimokl el Deleuill?

/_____/ YES
CHOI
/_____/ NO
NGDIAK

BEFORE THE COMPACT CAN TAKE EFFECT SECTION 314 UNDER QUESTION (B) BELOW MUST ALSO BE APPROVED BY AT LEAST SEVENTY-FIVE PERCENT (75%) OF THE VOTES CAST.

UCHEI RA BOL SEBECHEL A COMPACT EL MO RENGII A KLISICHEL EA BADES EL 314 EL NGARA EUNGEL A KER (B) ERIOU A KIREL MENGAI ER NGII EL KESENGIL ENG 75 EL PASENT (75%) ERA SENGKYO.

(B) Do you approve the agreement under Section 314 of the Compact which places restrictions and conditions on the United States with respect to radioactive, chemical and biological materials?

(B) Kau ke kongei ra telbiil el ngar cheungel a 314 el Bades ra Compact el ngii a mo merrob e cholecholt a teletael el mora Merikel el kirel a dokungas, kar ma baiking el klekedall?

⊥68

/_____/ YES
CHOI
/_____/ NO
NGDIAK

.....

A comparison of the two versions leads the court to the conclusion that Proposition I(B) on the official ballot does not substantially comply with RPPL No. 1-43.

When a statute requires a ballot to be "substantially" in a prescribed form, an exact copy is not required. *People ex rel. Howard v. Chicago and E.I.R. Co.*, 129 N.E. 846 (Ill. 1921). In *Howard*, the Supreme Court of Illinois considered the statute which provided that "the ballot of said election shall be substantially in the following form: Shall a special tax for road purposes be levied?

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/_____/ YES
/_____/ NO
....."

The wording in the ballot which was objected to was in the following form:

"For special tax of sixty-six and two-third cents on each one hundred dollars, assessed valuation, including railroads for a period of five years, for the purpose of improving, maintaining and repairing the earth roads hereon described by changing, grading, oil-treating and dragging.

/_____/ YES
/_____/ NO
....."

The Court held that the wording was in substantial compliance with the statute since it gave the voters the correct idea, though not in the exact language, and "embodies or contains the substance or main feature of the ballot found in the statute." So long as the printed matter on the ballot furnished to the voter means "the same thing to all of the voters as the words used in the statutory form, the statute will be substantially complied with." *Howard*, *supra*, at page 848.

⊥69 An analysis of the wording set forth in RPPL No. 1-43 reveals a neutral, straight forward question to be answered by the voter. However, the wording on the official ballot not only does not track that of RPPL No. 1-43 but it fails to meet the test of *Howard v. Chicago, supra*. The ballot patently suggests that by voting yes, the voter wishes to impose restrictions and conditions on the United States with respect to certain harmful substances.

Of crucial importance here, is the fact that by the duly adopted Constitution of the Republic of Palau, the electorate had previously and effectively banned the same type of materials and that any change in the situation could only be done by a 75% vote cast in referendum. Article II, Section 3; Article XIII, Section 6, Constitution of the Republic of Palau.

If the wording in RPPL No. 1-43 is used, then the voter is clearly asked to use his knowledge of the contents of Section 314 of the Compact. If he or she agrees to the proposition, then the person's vote is cast to alter the restrictions in the Constitution. There is no question that the wording in RPPL No. 1-43 means the same to all voters.

This is not true for the wording in the ballot. One may vote yes because he or she agrees to the provisions of Section 314 of the Compact (and effectively waives the pertinent constitutional restriction). Another voter may vote yes because he or she is against the use of radioactive substances but, unknowingly, is voting to ease the constitutional restrictions.

Testimony has been received as to the Palauan translation of Proposition I(B). Based on that testimony the court finds that the translated version on the official ballot is inaccurate and inconsistent so that it misleads and confuses the voters who must rely upon the wording to cast

their vote.

The contested portion reads "merrob e cholecholt a teletael el mora Merikel el kirel a dokungas, kar ma baiking el klekedall?" "Merrob" means to stop, prohibit or lay down. "e" symbolizes a word such as "and" or a connecting word, after which a reader will expect something to follow. "cholecholt a teletael" literally means to "show the condition."

Thus the objected to language is read to mean that Section 314 of the Compact would stop the United States and show the conditions under which it could use the harmful substances indicated. This of course, compounds the misleading language used in the English version and further distorts the true issue to be voted upon.

⊥70 Having found that the ballot does not comply with RPPL No. 1-43 and that it contains the defects mentioned, the court turns to the remedies to be accorded and to the defenses raised by the defendants.

The defendants are those government officials who, in one capacity or the other, are responsible for carrying out the executive function of conducting the referendum and plebiscite set for February 10, 1983. They have urged the court to dismiss the plaintiffs' action because the court lacks jurisdiction over the subject matter and the parties, the plaintiffs lack standing to maintain the suit, and the complaint fails to state a claim upon which relief can be granted.

As will be seen, these defenses overlap and cannot be isolated in the discussion relating to the rights of the plaintiffs and the authority of this court.

The right to vote is provided to all citizens of Palau by Article VII of the Constitution of the Republic of Palau. This right has been clarified, safeguarded, and preserved for all citizens by Republic of Palau Public Law No. 1-22. This law establishes procedures for voter qualifications and court review of disputes regarding the right to vote.

The constitutional right of all citizens of Palau to vote applies to the referendum and plebiscite for the Compact of Free Association. This applicability derives from Article I, Sections, 411 and 412 of the Compact of Free Association and Republic of Palau Law No. 1-43.

Since it has been found that RPPL No. 1-43 is not being complied with, the plaintiffs' right to vote is being infringed upon. By virtue of this fact, this court holds that the plaintiffs have standing in this case and that this court has jurisdiction over the subject matter of this action.

In election cases where the right to vote has been alleged to have been violated the Trust Territory court and courts in the United States have accepted jurisdiction of them. In *Bedor v. Remengesau*, 7 TTR 317 (Tr. Div. 1976), the Trust Territory court accepted the standing and jurisdiction of a class action suit where the class was comprised of similarly situated voters who were challenging a reapportionment law. In the Trust Territory Appellate Division case of *Chutaro v. Election Commissioner of the Marshall Islands and Alik*, TTR ___ (Civ. Action No.

25-79, October, 1981), the appellate court overruled a trial division decision denying jurisdiction in an election contest. In doing so the court held ". . . as ⊥71 long as a citizen of the Trust Territory has the right to vote, his vote should count. If for some reason that vote does not count and the reason is not corrected by properly constituted parties, then the logical place to look for recourse has to be in the courts.["] *Id*. at 6.

Courts in the United States have also accepted the standing of parties and taken jurisdiction over the actions in cases involving elections, ballots, and voting rights. In the State of Hawaii, in the case of *Johnston v. Ing*, 441 P.2d 138, the Hawaii Supreme Court took jurisdiction of a case and accepted the standing of a taxpayer who filed a complaint for a temporary restraining order to stop printing and distribution of election ballots and for an order directing the state's chief election officer to prepare and print ballots in accordance with statutory requirements. In numerous other cases courts in the United States have accepted the standing of the parties and taken jurisdiction of actions challenging the ballot language in elections. *See Cook et al., v. Baker*, 214 P.2d 787 (Colorado 1950); *Boucher v. Bomhoff*, 495 P.2d 77 (Alaska 1972); *Kahalekai v. Doi*, 590 P.2d 543 (Hawaii 1979).

Plaintiffs in this case move for a preliminary injunction. The authority to grant injunctive relief arises from Rule 52 of the Trust Territory Rules of Civil Procedure.

At the outset of the hearing on this matter on January 29, 1983, counsel agreed to a consolidation of the hearing with the trial on the merits pursuant to Rule 52a(2), Trust Territory Rules of Civil Procedure. The court ordered the same at the hearing[,] and the matter proceeded with both sides producing testimony. The defendants have filed their answer[,] and the matter is ripe for a final determination. Following this final determination the defendants may appeal the court's judgment if they wish to do so. Article X, Section 6, Constitution of the Republic of Palau.

The court is mindful of the fact that an injunction is an extraordinary and drastic remedy which should not be granted unless the movant carries the burden of persuasion. *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567. The court also recognizes that the function or purpose of an injunction is to prevent and deter future injury or a violation of rights which will in all reasonable probability result. *Madrainglai v. Emesiochel*, 7 TTR 13 (Tr. Div. 1974), *Collum v. Edwards*, 578 F.2d 110.

Courts have been fairly consistent in examining several factors when deciding whether or not to utilize its discretion and issue an injunction. Counsel for both parties ⊥72 accurately cited the following as the appropriate questions for the court to ask: (1) Did the plaintiff make a strong showing that he is likely to prevail on the merits? (2) Did the plaintiff show that without such relief he will be irreparably harmed? (3) Would the grant of an injunction substantially harm other parties interested in the proceeding? and (4) Where does the public interest lie? *Madrainglai v. Emesiochel*, *supra, Hardin v. Houston Chronicle Pub. Co.*, 572 F.2d 1106, 1107.

Plaintiffs have sustained their burden of persuasion needed for the granting of their motion for the injunction. This court finds that the plaintiffs will be irreparably harmed by being

denied their constitutional right to vote if the ballot language were to remain as set forth by the defendants.

The equities involved with the issue of whether to enjoin the defendants at this stage of the referendum and plebiscite weigh heavily in the plaintiffs favor. While the defendants have testified as to the cost of printing, distributing, and educating the public concerning the ballot language, the court finds that these costs are insignificant when compared with the costs of having to provide a second referendum and plebiscite if the February 10, 1983, referendum and plebiscite were to be ruled invalid or void after its completion.

The overriding public interest lies in having a referendum and plebiscite on the Compact of Free Association that is a ". . . free and voluntary choice by the people . . . of their future political status through informed and democratic processes . . . ." Title 4, Article I, Section 412, Compact of Free Association. Since the court finds that the language of the ballot will not allow a free and impartial vote, the court is compelled to enjoin the defendants from carrying out the referendum and plebiscite with the tainted language of the present ballot.

Authority for enjoining an election is found in *Bedor v. Remengesau*, 7 TTR 317 (Tr. Div. 1976), where the Trust Territory court ordered the postponement of an election in the Palau District in order to give the election commissioner time to implement a reapportionment plan provided by the court.

Authority from the United States to order changes in the ballot can be found in the case of *Johnston v. Ing.*, *supra*. In that case the Hawaii Supreme Court stated that the trial court has "the power to prevent use of a ballot not in conformity with the law and to compel officials to prepare and distribute proper ballots." *Id*. at 140. The court further ⊥73 elaborated on the trial court's power in stating that:

> ". . . when a trial court determined that election ballots had not been printed in the proper form and that there is sufficient time to reprint them before election day, it should order that corrected ballots be printed and distributed." *Id*. at 140.

While remaining cognizant of the extraordinary relief this court is ordering in this case, the court also takes notice of the broad authority it is vested with pursuant to Republic of Palau Public Law. No. 1-22. Republic of Palau Public Law No. 1-22 was enacted to clarify, safeguard, and preserve the right to vote for all citizens of the Republic of Palau. In order to carry this out, the law provided for court review of alleged violations of the right to vote and vested the court with broad power for preventative relief. Section 5(c) of RPPL No. 1-22 states:

> "The Supreme Court of the Republic of Palau may issue any order, suspend any election, reorganize any procedure for elections or take any actions excluding reapportionment as may be necessary to insure conformity with the requirements of this Act."

The defendants have also raised the issue of sovereign immunity and assert that this court

does not have the power or authority to encroach upon their duties and actions or those of the United States under the Trusteeship Agreement. Citing *Alig v. Trust Territory*, 3 TTR 64 (Tr. Div. 1965).

The theory espoused by the defendants in their brief is stated as follows:

> "It is uncontestable that the Republic of Palau is subject to a strategic trust agreement between the United States and the United Nations. The referendum and the Compact of Free Association (COMPACT), *including the determination of the ballot language for the same*, . . . is an obligation and result of the United States responsibility under the Trusteeship Agreement . . . [.]" (emphasis added).

To further support this position, the defendants cite Section 411 of the Compact.

⊥74 This court finds no basis whatsoever for the proposition that the United States can dictate the wording of the ballot. As discussed above, the Preamble and Sections 411 and 412 of the Compact as well as the Constitution of the Republic of Palau and Republic of Palau Public Law No. 1-43 leads to the conclusion that this is a matter to be left to the constitutional and democratic processes of the Republic of Palau. The one possible exception is Department of Interior Secretarial Order No. 3039 which states that after a law is signed by the President of Palau, the High Commissioner of the Trust Territory of the Pacific Islands has 20 days to veto or suspend the legislation. This was not done and the veto period has long expired.

At the hearing on this matter, it was revealed that after the Compact was signed by the Government of Palau on August 26, 1982, discussions were held with officials of the United States Government concerning the wording to be placed on the ballot.

Of particular interest is the letter from the Office for Micronesian Status Negotiations to Ambassador Salii.[2] This letter, dated October 24, 1982, is marked Exhibit C and attached to the affidavit of Ambassador Salii which was filed in this matter.

Included in that letter is a confirmation of an agreement that the question to be presented to the voters of Palau relating to Section 314 would read:

> "[. . .]and its subsidiary agreements including the agreement on radioactive, chemical and biological substances concluded pursuant to Section 314 of the Compact."

The similarity between this wording and that found in Republic of Palau Public Law No. 1-43 which was enacted 16 days later is obvious.

Yet, two days after RPPL No. 1-43 was signed, Ambassador Salii received a cable from

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[2] Ambassador Salii represented the Republic of Palau and negotiated most of the Compact provisions as they dealt with Palau.

Ambassador Zeder which contains the wording found in the official ballot.[3] This ⊥75 cable is identified as Exhibit E, Attached to Ambassador Salii's affidavit.

Ambassador Salii has testified that the wording in Republic of Palau Public Law No. 1-43 was rejected outright by the United States[,] and it was insisted that the wording incorporated in the cable of November 11, 1982, be placed on the ballot. In order to comply with this directive the defendants caused to be printed the ballot with the United States' version of the ballot language.

There is no assertion made, indeed there is no doubt, that the wording in RPPL No. 1-43 relating to harmful substances does not adequately and sufficiently set forth the issue to be voted on.

If 75% or more of the voters vote yes on the harmful substances proposition set forth in RPPL No. 1-43, the requirements of the Palau Constitution are met and the United States has its approval of Section 314.

The ministerial act of utilizing the wording in RPPL No. 1-43 and the printing of the ballot is not a matter of national policy or a case of government officials performing a political act as defendants assert. Article VIII, Section 7(2) of the Constitution, which provides that the responsibility for negotiating with foreign nations and the making of treaties is in the executive branch, cannot be used as a basis for changing language in a ballot contrary to that indicated by the legislature.

It has been testified and argued that if the election proceeds with the wording set forth in RPPL No. 1-43, the United States will reject the plebiscite and referendum. This strikes the court as a strange and unsupportable position. Should the electorate pass Propositions I(A) and I(B) by the necessary votes, it is inconceivable that the United States would disclaim obtaining what it clearly has sought. Should either or both propositions fail, there is nothing for the United States to reject. The "rejection" threat is a *non sequitur*.

It is therefore concluded that the election, currently scheduled for February 10, 1983, shall be set over to a new date, if needed, to enable the officials in charge of the election to print new ballots and distribute them. The wording, as hereinafter indicated, is relatively simple and the translation into Palauan should be perfunctory matter. It has been testified that $230,000 has been spent to date, but the major part of that was for political education purposes. That ⊥76 has been completed and the re-printing of the ballots does not require any further education program.[4]

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[3] Ambassador Zeder is the representative of the United States for concluding the status negotiations with Palau as well as the Marshall Islands and the F.S.M.

[4] Republic of Palau Public Law No. 1-43, Section 8, establishes a Political Education Committee. The Committee was directed to "organize, supervise and oversee a political education program on the Compact of Free Association and its subsidiary agreements." It was only when one of the plaintiffs raised the objection as to the ballot wording that the Committee felt it had to educate the voters on the contents of the ballot. *See* Plaintiffs' Exhibits 1 and 2.

On January 31, 1983, a further hearing on the matters of the election date and wording of the ballot was held. At that time the defendants indicated that the ballots could be printed on this day and that, administratively, the executive branch could still hold the referendum and plebiscite on February 10, 1983.

Additionally, the defendants submitted a proposed draft of the new ballot. The plaintiffs stipulated to the wording of the ballot, including the Palauan translation of Proposition I(B). The judgment will set forth said ballot language.

This memorandum opinion shall constitute the findings of fact and conclusions of law of the court pursuant to Rule 41(a), Trust Territory Rules of Civil Procedure and that further, this opinion and the judgment entered thereon shall be pursuant to Rule 52(d), Trust Territory Rules of Civil Procedure.

That such an approach was not directed in RPPL No. 1-43 is clear. This further points out the inconsistency and problems with the ballot which the Committee itself acknowledged.