Elbelau v. Election Commission, 3 ROP Intrm. 426 (Tr. Div. 1993)

WATARU ELBELAU; MAIDESIL RECHULD; ASAO FRANZ; JOHANA ELBELAU; MARCIANA MAIDESIL; LILLIAN NGIRNGOTEL
Plaintiffs,

v.

OFFICE OF THE ELECTION COMMISSIONER, REPUBLIC OF PALAU; WILLIAM NGIRAIKELAU,
Defendants.

CIVIL ACTION NO. 475-92

Supreme Court, Trial Division
Republic of Palau

Decision and judgment
Decided: October 4, 1993

MILLER, Associate Justice:

This action challenges the qualifications of defendant William Ngiraikelau to be elected to the House of Delegates of the Olbiil Era Kelulau from the State of Ngeremlengui, and presents difficult constitutional questions both on its merits and as to this Court's power to decide those merits at all. Part I of this decision addresses the motion to dismiss filed by the government defendant and joined in by Ngiraikelau. Part II constitutes the Court's findings of facts and conclusions of law following a trial held on August 31, 1993.

I. DEFENDANTS' MOTION TO DISMISS

On January 27 of this year, on the basis of a report of its Credentials Committee, the House of Delegates voted to seat Ngiraikelau as one of its members. According to defendants, this fact, taken in conjunction with Article IX, Section 10, of the Palau Constitution, bars any further consideration of plaintiffs' ⊥427 claims and requires dismissal of this action. Article IX, Section 10, states in pertinent part:

> "Each house of the Olbiil Era Kelulau shall be the sole judge of the election and qualifications of its members . . ."

The Court believes that were this case to be decided under the United States Constitution as interpreted by the United States Supreme Court, defendants' position would surely be correct. The Court reaches a different conclusion, however, with respect to the Palau Constitution.

In *Powell v. McCormack* , 395 U.S. 496 (1969), which the Appellate Division of this Court has previously followed, *see Salii v. House of Delegates* , 1 ROP Intrm. 708, 713 (1989),

the Supreme Court held that it had jurisdiction to review the House of Representatives' decision to exclude Powell for a reason not set forth in the Constitution. However, it expressly reserved the question whether "federal courts might . . . be barred by the political question doctrine from reviewing the House's factual determination that a member did not meet one of the standing qualifications". 395 U.S. 486, 521 n.42 (1969).[1]

Three years later, the Supreme Court stated in an election dispute that the question "[w]hich candidate is entitled to be seated in the Senate is . . . a nonjusticiable political question". ⊥428 *Roudebush v. Hartke* , 405 U.S. 15, 19 (1972). [2] And just this year, the Court explained *Powell* as holding that "[t]he decision as to whether a member satisfied the[] qualifications [set forth in the Constitution] was placed with the House, but the decision as to what these qualifications consisted of was not." *United States v. Nixon* , 122 L. Ed. 2d 1, 14 (1993) (emphasis in original). In other words, while the Court in *Powell* was entitled to rule, as it did, that Congress could not exclude a candidate except on the basis of the qualifications set forth in the Constitution, it had no jurisdiction to review a determination that a candidate did or did not meet those qualifications.[3]

Notwithstanding these precedents, the Court believes that a different result should obtain here. The Court looks first to the relevant constitutional history. The Committee Analysis of what was to become Article IX, Section 10, stated:

> "Consistent with the doctrine of separation of powers, the Assembly is to be the sole judge of the election and qualifications of its members with the implied exception of those eligibility requirements set forth in the Constitution. The Assembly has the power to determine which candidate is elected in any election and whether a person is qualified to hold the office of senator. The Assembly may, by law, vest the courts with the ability to decide contested elections and ⊥429 the Assembly would be bound thereby." Standing Committee Report No. 22, March 2, 1979, at pp. 16-17.

The mention of an "implied exception" in the first sentence of this analysis, although somewhat contradicted by the second sentence, at least suggests that the framers did not intend to shut the door completely on judicial intervention in these matters. Perhaps more important, the third sentence makes clear that the legislature's power to determine these issues may, if it chooses, be vested in the courts.

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[1] *See also, id.* at 548 (holding that the concomitant U.S. constitutional provision "is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution").

[2] Notably, the Court retained jurisdiction of the case because although the Senate had determined to seat one of the candidates, it had done so "without prejudice to the outcome of an appeal pending in the Supreme Court of the United States, and without prejudice to any recount that the Supreme Court might order". *Id.* at 18.

[3] *Accord, Morgan v. United States*, 801 F.2d 445, 447-50 (D.C. Cir. 1986); *McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985).

Although the matter is far from clear, the Court believes that the OEK has given courts that power. 23 PNC 106(a), part of the Voting Rights Act of 1981, see 23 PNC 101, gives the Supreme Court "jurisdiction over all proceedings instituted pursuant to this chapter", and 23 PNC 106(c) empowers the Court to

> "issue any order, suspend any election, void any election, reorganize any procedures for elections or take any actions excluding reapportionment as may be necessary to insure conformity with the requirements of this chapter."

To be sure, the chapter in question as noted above, is named the "Voting Rights Act" and relates primarily to voter qualifications. However, as discussed in part II of this opinion, 23 PNC 107(c), which sets forth guidelines for determining "residence and residency . . . for the purpose of national elections" apparently was intended to apply to residency requirements for candidates as well as voters. *See* 23 PNC 107(c)(7), discussed at p. 9 *infra*. This action can thus be seen as a request that the Court exercise its authority under 23 PNC 106(c) "to insure conformity with" those requirements.

⊥430 Plaintiffs also point to 23 PNC 1107, which delegates to the Election Commission, *see* 23 PNC 1201, the power "to investigate all candidates to ensure that all the qualifications of the office have been met" and states that "[i]f a prospective candidate has not met the qualifications of office then the name of the candidate shall not be placed on the ballot". Clearly, any prospective candidate who was so excluded would have the right to challenge the Election Commission's decision in Court. *See* 6 PNC 147. But if the legislature has given the Election Commission, and, by extension, the courts, the power to decide whether a candidate possesses the qualifications to be elected when he or she claims to have been wrongfully excluded from the ballot, it would be incongruous to conclude that the courts have no power to determine the same question when, as is asserted here, it is said that a candidate does not have the requisite qualifications.

Recognizing the force of these arguments, defendants conceded at oral argument that judicial cognizance would not have been wholly foreclosed by the Constitution insofar as the Court had acted at a time prior to the OEK's decision to seat Ngiraikelau, but urged that the OEK's action was sufficient to end this case. The Court agrees with defendants that ideally this case would have been tried (and future cases should be) before the OEK had acted. The fact that it was not, however, is not the fault of plaintiffs, [4] ⊥431 and should not serve to bar them from their day in court.[5]

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[4] This is not to say that plaintiffs could not have acted more promptly. This lawsuit, commenced on December 14, 1992, challenges an Election Commission determination that was made on September 28, 1992. In subsequent cases, the Court believes that Plaintiffs should be required to file similar complaints at the earliest practicable date. Even if prudence dictates that no trial be held until after the election, the earlier filing will enable the Court and the parties to go forward promptly thereafter.

[5] As all are aware, at the time this action was filed, the Court had only two sitting Justices, one of whom was devoting his full energies to the trial of the assassination case, and the other of whom was therefore left with the full burden of the Court's workload.

Having said all this, the Court believes that this area is deserving of legislative attention before the next quadrennial elections are held. If, as the Court has concluded above, the OEK intended that the Court have jurisdiction to act in these matters, [6] then it would be profitable for it to say so explicitly, setting forth whatever procedural guidelines it believes appropriate. *See, e.g.*, n.4 *supra*. If, on the other hand, it wishes not to delegate its authority in this regard, it should say that. The Court may still be faced with the question whether the Constitution, of its own force, gives it the authority to act in these circumstances, [7] but it will at least be assisted in doing so by the clear views of ⊥432 another branch of government. *See* p.10 *infra.*

II. THE MERITS

Article IX, Section 6, of the Palau Constitution contains four requirements for holding office in the Olbiil Era Kelulau. A person must be:

1) a citizen;

2) not less than twenty-five (25) years of age;

3) a resident of Palau for not less than five (5) years immediately preceding the election; and

4) a resident of the district in which he wishes to run for office for not less than one (1) year immediately preceding the election.

This case turns on the fourth such requirement -- whether William Ngiraikelau was a resident of Ngeremlengui State within the meaning of the Constitution for at least the year preceding the 1992 election.

Following an informal hearing, Palau's Election Commission determined that he was eligible based on the fact that he had registered to vote in Ngeremlengui in September 1970, and on its finding that the subsequent deletion of his name from the voting rolls of Ngeremlengui had been in error. *See* Election Commission Determination No. 2 (Sept. 28, 1992). As explained in testimony presented at trial, the unstated rationale for the Election Commission's determination was its general practice of determining residency and declaring eligible for election from a particular state any person who had registered to vote in that state at least ⊥433 a year prior to the scheduled election date.

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[6] The Court is aware that the House of Delegates resolution seating Ngiraikelau recited the Constitutional language that "each house . . . is the sole judge of the election and qualifications of its members". With due respect, however, the Court believes that the statutes cited above -- each enacted by both houses of the OEK and signed into law by the President -- must supersede a simple recital by one house of a later legislature.

[7] *See Salii*, 1 ROP Intrm. at 713: "This Court is the ultimate interpreter of the Constitution, and has the responsibility of deciding whether the action of any (other) branch of government has exceeded whatever authority has been committed to it (by the Constitution)."

In bringing this action, plaintiffs asserted that the Election Commission's determination was inconsistent with the judgment of this Court in *Skebong v. Election Commissioner* , Civil Action No. 3-84 (July 19, 1984), *aff'd in pertinent part* , 1 ROP Intrm. 366 (1986). Paragraph 5(e) of that judgment, *see* 1 ROP Intrm. at 372 n.5, decreed

> "No reference or use whatsoever shall be made to the ballots cast or registration books last used to determine voter eligibility in the December 16, 1983, or any prior Ngeremlengui State Election. To that end said ballots and registration lists are hereby declared null, void and of no force [or] effect now or at any time whatsoever, it being the intent of this Order that an entirely new and separate voter registration list be compiled for use in any newly scheduled election."

Defendant Ngiraikelau does not contest that the Election Commission's determination had contravened *Skebong* by relying upon Ngremlengui's pre-1983 voting rolls in determining eligibility. Although he asserts that application to him of the *Skebong* decision -- to which he was not a party -- is unfair and unconstitutional, the case was tried on the basis of his assertion that even if the Election Commission's determination is disregarded, he was nevertheless eligible for election as a matter of fact and law.

As the case has thus been presented, the Court is called upon to discern the meaning of the residency requirement contained in Article IX, Section 6(4), and then to decide whether on the facts established through stipulation and at trial, William Ngiraikelau fulfilled that requirement.

⊥434 A. The Meaning of Resident

The Palau Constitution, while using the term "resident" twice in the course of Article IX, Section 6, does not define it. To fill this gap, Ngiraikelau suggests that the Court look to the draft of this provision proposed by the Committee on the Legislature of the Palau Constitution Convention. There, the section that became Section 6 contained the following definition:

> "For the purposes of this Constitution, a resident is a person who maintains a residence in a county of Palau for an unlimited or indefinite period and to which the person intends to return, whenever absent, even if absent for an extended period of time." Standing Committee Report No. 22, March 2, 1979, at p.14.

The problem with this suggestion, as plaintiffs point out, is that this language was ultimately deleted from the Constitution. The Court believes that it would be inappropriate to use this language as a guide when, in the final analysis, the framers of the Constitution determined to delete it.

A better guide, the Court believes, is found in 23 PNC 107(c), which was passed by the first legislature, and which states that "[r]esidence and residency shall be determined for the purpose of national elections according to" a series of guidelines discussed below. That the OEK

intended this statute to govern the issue here (and not simply the question of voter registration) is made clear by 23 PNC 107(c)(7) (emphasis added):

> "For the purposes of placing a candidate's name on the ballot , once residence is established, the period of residence is computed by including the day on which the individual's physical presence coupled with requisite intent commenced and by excluding the day of the election."

Whether the Court should adhere to this statute on a matter ⊥435 of constitutional interpretation is a more difficult question but follows, the Court believes, from two observations. First, the statute represents the considered view of a co-equal branch of government on the issue presented by this case. That view, although not binding on this Court, is entitled to careful consideration. See 16 Am. Jur. 2d, *Constitutional Law* § 126 at 487 ("[A] practical construction by Congress of a provision of the Constitution is entitled to great weight and ought not to be lightly disregarded"). Second, and more fundamental, 23 PNC 107 was passed by the first elected legislature of the Republic after the framers of the Constitution had decided, by their deletion of the language cited by plaintiffs, not to address the matter more specifically within the framework of the Constitution. Given those circumstances, it seems appropriate to infer that the framers intended that the question of the meaning of residency be addressed in subsequent legislation. In that light, paying deference to the statutory definition of residency can be viewed as following the intent behind the Constitution itself. *See Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888) (An act "passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument ... is contemporaneous and weighty evidence of its true meaning").

Turning then to the statute, "Residence" is there defined as "a political jurisdiction in which an individual has been physically present on a reasonably continuous basis within a 30 day period with the intent to establish his permanent home ⊥436 therein." 23 PNC 103(h). [8] "Reasonably continuous basis" is, in turn, defined as "at least 25 days out of a period of 30 consecutive days with an interruption of no more than 48 consecutive hours within the 30 day period". 23 PNC 103(f).

23 PNC 107(c)(1) then provides:

> "Once residence is established it is maintained unless the individual is physically present in another political jurisdiction on a reasonably continuous basis within a minimum 30 day period with the intent to establish his permanent home therein."

Finally, 23 PNC 107(c)(4) provides that

> "[w]hen an individual no longer maintains physical presence on a reasonably continuous basis in a political jurisdiction, whether that individual continues to have the intent to establish his permanent home within that political jurisdiction

[8] This and the following definition are found not in 23 PNC 107 itself, but in a preceding definitional section, 23 PNC 103.

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> will be determined by an examination of the connection of that individual to the political jurisdiction."

It then lists ten factors (*see* pp. 12-14 *infra*) to be considered in making that determination.

B. Was Ngiraikelau a resident of Ngeremlengui?

With these rules in mind, we turn to the questions whether William Ngiraikelau ever established residency in Ngeremlengui State and, if so, whether his residence changed before the 1992 elections. The first question is easy: It is undisputed that Ngiraikelau was raised in Ngeremlengui and attended elementary school there. Although he attended high school in Koror, living in a dormitory while school was in session, he registered to vote ⊥437 in Ngeremlengui when he came of voting age in 1970. [9] The Court has no difficulty in concluding that, as of that time, Ngiraikelau was a resident of Ngeremlengui. The question, then, is whether he ever changed that residence.

From 1971 to 1973 and from 1975 to January 1979, Ngiraikelau attended school in the United States, and from June 1979 to 1982, worked at Trust Territory headquarters in Saipan. In intervening periods during these years, he returned to live in Ngeremlengui. Since 1982, however, when he returned to Palau from Saipan, he has been employed by businesses and agencies located in Koror -- Micronesian Occupational College, the Palau Fishing Authority, the Palau Pension Plan, and the National Development Bank. During this time, he has stayed with his wife and family in a house in Ngerbeched, returning to Ngeremlengui on weekends and holidays.

During these years, therefore, he no longer "maintain[ed] physical presence on a reasonably continuous basis" in Ngeremlengui, and the Court is called upon to consider Ngiraikelau's ties to Ngeremlengui under the multi-factored analysis set forth in 23 PNC 107(c)(4). *See* p.11 *supra*. The Court makes these findings:

> "(A) The amount of time the individual is physically present within the political jurisdiction" -- Although working in ⊥438 Koror, Ngiraikelau historically spent a substantial amount of his non-working time in Ngeremlengui.
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> "(B) Whether the individual maintains a home within the political jurisdiction" -- On his visits to Ngeremlengui, Ngiraikelau stayed in the home of his parents, which he considers his own and believes he will inherit.
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> "(C) The existence, and maintenance, of close ties with family, relatives, and friends who are physically present on a reasonably continuous basis within the political jurisdiction" -- By his testimony, Ngiraikelau maintains close ties with

[9] While the *Skebong* decision may have invalidated Ngiraikelau's 1970 registration to vote in Ngeremlengui, it plainly had no effect on the facts of his life nor barred this Court's consideration of them. In particular, his decision to register in Ngeremlengui is probative of his belief, at least as of that time, that Ngeremlengui was his permanent home.

his parents, three sisters, two brothers and one of his children, all of whom live in Ngeremlengui. Ngiraikelau also has friends whom he visits there.

"(D) The conduct of business in, and the maintenance of business contacts with persons who are physically present on a reasonably continuous basis within the political jurisdiction" -- No evidence presented.

"(E) The degree of personal involvement in the social, political, cultural, governmental, traditional, and religious affairs of, and organizations and institutions operating within, the political jurisdiction" -- Ngiraikelau was elected to the Ngeremlengui State Legislature in 1987 and in 1991, the second time becoming its Speaker. He has also been involved in certain community organizations and projects there.

"(F) The ownership of property within the political jurisdiction" -- Ngiraikelau owns a piece of land in Ngeremlengui that was given to him by his grandfather.

"(G) Other indicia of the connection of an individual with a political jurisdiction " -- No evidence presented.

"(H) The foregoing factors as applied to establish the connection of an individual with another political jurisdiction" -- Ngiraikelau spends the majority of his time living and working in Koror; he has a home that is built on land belonging to his wife's relatives; and he is friends with and/or is related to at least one family that lives in Koror.

"(I) The attempt to register to vote in, or file nomination papers as a candidate for office in or from, another political jurisdiction" -- At the direction of election authorities, Ngiraikelau registered to vote and voted in Ngerbeched in 1984 and 1988. By his testimony, he did not vote in Koror State elections, but only in the national elections for President and Vice President.

"(J) Whether another political jurisdiction could be ⊥439 established as a residence" -- With the requisite intent, Koror could likely be established as his residence instead of Ngeremlengui.

While the balancing of these factors is not one-sided, the Court finds that, on the whole, Ngiraikelau remained a resident of Ngeremlengui and remained eligible to run for national office from that state in 1992. On the facts presented, Ngiraikelau has been shown to be a person who, notwithstanding the economic reality that most jobs for educated Palauans -- and most jobs generally -- are to be found in Koror, has maintained his personal and political ties to Ngeremlengui. Perhaps most important in the Court's analysis is the fact of Ngiraikelau's election to the Ngeremlengui State Legislature. While that fact is not conclusive (because eligibility for the State Legislature is governed by the requirements of the Ngeremlengui State Constitution), the Court would have a very difficult time concluding that a person twice elected

to a state's legislature and serving as its Speaker was nevertheless insufficiently "connected" to that state to serve as one of its representatives in the national congress. When that fact is added to Ngiraikelau's other Ngeremlengui ties and to his abstention from participating in Koror's political life,[10] the Court is compelled to conclude that he has remained, for ⊥440 constitutional purposes, a resident of Ngeremlengui.

It is true, as plaintiffs' counsel points out, that on the Court's ruling Ngiraikelau will be deemed a resident of Ngeremlengui even though he has "lived" (in ordinary parlance) in Koror for ten years, and is likely to remain living there for the rest of his working life. But where it is plain that Ngiraikelau's ties to Ngeremlengui are genuine and that he is on no account a "carpetbagger",[11] the Court believes that the result it reaches is consistent with the Constitution and with the statute implementing it.

Having reached this conclusion, the Court makes two additional observations. First, the Court finds that it need not answer all of the legal questions framed by the parties, including the question whether the Constitution requires a person to maintain a physical presence of twelve months in order to establish himself as a resident of a particular state. These questions arose from Ngiraikelau's attempt to re-register in Ngeremlengui in 1987 after having been told by officials that his previous registration had been stricken. [12] It suffices to say that if Ngiraikelau's only ⊥441
claim to residency in Ngeremlengui were having spent thirty days there for that explicit purpose, the Court would be faced with significant constitutional and statutory doubts. But that is plainly not the case here.

Second, the Court respectfully suggests that the process that has apparently been employed by the Election Commission to test the eligibility of potential candidates may not be sufficient to the task. The mere fact that a person registered to vote in a particular state a year or more prior to an election does not answer the question whether since that time he or she has become a resident of some other state, either because of a manifested intent to reside elsewhere, *see* 23 PNC 107(c)(1), or because of a too attenuated connection to the state of registration, 23 PNC 107(c)(4). That a person registered to vote in a particular state in 1970, or even in 1987, is simply not enough to answer the question whether he remained a resident of that state within the meaning of the Constitution in 1992. In most cases, the result may perhaps be the same; nevertheless, as indicated above, the Court believes that the issue deserves a more searching

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[10] The Court does not ignore the fact that, having been informed that his Ngeremlengui voting registration had lapsed, Ngiraikelau registered to vote in Ngerbeched. Of significance to the Court, however, is Ngiraikelau's uncontradicted testimony that while he did so to be able cast his vote for President of the Republic of Palau, he did not vote for the election of any Koror State officeholder.

[11] "Carpetbaggers" were Northerners who moved to the South immediately after the U.S. Civil War and were often installed in office even though they had little or no connection with the people they were supposed to represent.

[12] Contrary to plaintiffs' suggestions, the Court does not regard Ngiraikelau's actions in this regard as indicative of some "guilty knowledge" that he was not a resident of Ngeremlengui, but as an attempt to establish bureaucratically a status he believed he retained in any event.

analysis.[13]

⊥442 CONCLUSION

For the reasons stated in Part I above, defendants' motion to dismiss is denied. For the reasons stated in Part II, plaintiffs' request for a declaratory judgment is denied and judgment is hereby entered on behalf of defendants.

[13] The Court is unaware of the extent to which the Election Commission attempts to ensure that a person's voting registration remains valid from year to year. But even assuming that a continuing investigation of the residency of all voters is impractical, it is surely worth the effort every four years to inquire more deeply with respect to the much more limited number of persons who choose to run for office.