Nicholas v. Palau Election Comm'n, 16 ROP 235 (2009)

BRIAN SERS NICHOLAS,
Appellant,

v.

PALAU ELECTION COMMISSION,
Appellee.

CIVIL APPEAL NO. 08-056
Civil Action No. 08-259

Supreme Court, Appellate Division
Republic of Palau

Decided: September 3, 2009

Counsel for Appellant: Oldiais Ngiraikelau, Yukiwo P. Dengokl

Counsel for Appellee: Nelson J. Werner, Assistant Attorney General

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Appellant Brien Sers Nicholas p.236 ("Nicholas" or "Appellant") is a citizen of Palau who has lived in Saipan since 1989. This case concerns Appellant's eligibility to run for election to the Olbiil Era Kelulau ("OEK"). Prior to the Fall 2008 election, the Palau Election Commission determined that Appellant did not meet the residency requirement for membership in the OEK, was ineligible to hold office, and could not be on the ballot.

Appellant brought the matter before the Supreme Court, Trial Division, asking for a declaratory judgment that he was a "resident" in the meaning of Palau's election laws, along with other relief. The Trial Division denied Appellant's request, determining that he was not a "resident" as required for eligibility for the OEK. Appellant here appeals that determination.

TRIAL DIVISION DECISION

The Trial Division looked to Constitutional, case law, and statutory authorities before determining that candidate residency requirements differ substantively from voter residency requirements. Eligibility requirements for membership in the OEK are laid out in the Palau Constitution, in Article IX, Section Six. Under that section, to be eligible for office in the OEK,

a person must be a citizen of Palau; 25 years of age or older; a resident of Palau for not less than five (5) years immediately preceding the election; and a resident of the district in which he wants to run for not less than one (1) year immediately preceding the election.

In contrast, with regard to voter residency requirements, the Constitution says only that "the Olbiil Era Kelulau shall prescribe a minimum period of residence and provide for voter registration for national elections." Article VII. Voter eligibility requirements are further described in the Voting Rights Act, codified at 23 PNC § 101 *et seq.* ("the Voting Rights Act"). The Voting Rights Act, which was created to protect the right to vote through uniform and transparent voter eligibility standards, states that "[a] citizen of the Republic eighteen (18) years of age or older may register and vote in any. . . election or referendum provided he has satisfied the minimum periods of residency established by law and is not in jail serving a sentence for a felony or mentally incompetent as determined by a court." 23 PNC §§ 102, 107(a). For the purposes of gauging whether a citizen has fulfilled the minimum period of residency, the Voting Rights Act describes a resident as "an individual [. . . who] has been physically present [in the political jurisdiction] on a reasonably continuous basis within a 30 day period with the intent to establish his permanent home therein." 23 PNC § 103(g)-(i). Additionally, the Voting Rights Act provides that, once an individual establishes residency, residency is maintained indefinitely "unless the individual is physically present in another political jurisdiction on a reasonably continuous basis within a minimum thirty (30) day period with the intent to establish his permanent home therein." *Id.* at § 107 (c)(1). For the situation where a person no longer maintains a physical presence in Palau but still claims residency, the Voting Rights Act provides ten (10) factors to weigh the person's connection to Palau, to be used to determine if the person has retained the intent to make Palau his permanent home. *Id.* at § 107(c)(4)(A)-(J).

The Trial Division determined that a p.237 candidate's residency status should be evaluated independent of the Voting Rights Act scheme, with reference to the Constitutional text only. The Trial Division listed several reasons for this conclusion:

For one, the court noted that the residency requirements for voters and candidates are separate in both the Constitution, where Article VII addresses voter eligibility and Article IX, Section Six addresses eligibility for OEK membership, and in Title 23 of the Palau National Code. Title 23 contains both the Voting Rights Act and the enabling legislation for Article IX, Section Six. However, the Voting Rights Act, 23 PNC §§ 101-111, is located in Division 1 of the Title, entitled "Right to Vote," while the enabling legislation for Article IX, Section Six, 23 PNC § 1102, which restates the Constitutional language, is located in Division 2 of the Title, in Chapter 11, "Candidates." The court also determined that the language and stated intent of the Voting Rights Act are focused on voters, not on candidates. "The purpose of [the Act] is to prevent any activity. . . from denying. . .any qualified citizen. . . from exercising the right to vote." 23 PNC § 102(d) (quoted at Tr. Op. at 8).

Secondly, the court noted that voter eligibility is fundamentally different from candidate eligibility. While "restrictions of the right to vote are extremely limited and only a minimal residency period will pass constitutional muster," holding office "is not a fundamental right." Tr. Op. at 7. This Constitutional difference is reflected in the text of the Constitution itself, which

mandates a five year residency requirement for OEK membership and no explicit residency requirement at all for voting. Considering this difference, it is reasonable that candidate eligibility is more restrictive than voter eligibility and that candidates must have a closer physical connection to Palau than voters must have.

Additionally, the Trial Division looked to past precedent to determine that voter and candidate residency requirements differ. Specifically, the court examined *Ngerul v. Chin*, 8 ROP Intrm. 295 (2001), for its treatment of candidate residency requirements. In *Ngerul*, a candidate's eligibility for the OEK was challenged on the grounds that he did not fulfill the five year residency requirement in the Constitution. *Id.* The candidate had moved to Palau with his family in 1994, before being called to duty by the United States Army for a three year assignment in Kwajelein. He returned in 1997 and ran for a senate seat in 2000. The *Ngerul* court found that the Constitutional residency requirement did not require continuous physical presence and that the candidate had established residency, from his three years of physical presence, combined with the three years his family resided here, while he was on duty elsewhere. The Trial Division in this case found that *Ngerul* implicitly drew a line between the Constitutional candidate residency requirement and the 30 day statutory residency requirement for voters. Tr. Op. at 5. However, as the Trial Division noted, *Ngerul* also states that the Voting Rights Act "defined residency for both voting and candidacy purposes to mean some physical presence and an intent to establish a permanent home in the jurisdiction." 8 ROP Intrm. at 298 (quoted at Tr. Op at 4). The Trial Division concluded that *Ngerul* did not actually use the Voting Rights Act to evaluate candidate p.238 residency, but that it looked to the Voting Rights Act for confirmation that the framers did not intend to require a person to live continuously within Palau to maintain the status of resident. Tr. Op. at 7.

Based on the above authorities, the Trial Division concluded that Appellant could not be considered a resident of Palau for the purposes of OEK . In contrast to the candidate in *Ngerul*, who showed his intent to establish his permanent home in Palau by moving his family here, giving up any other home, and residing here, when he was not commanded to be elsewhere, Appellant has no home in Palau and resides, with his family, in Saipan. The Trial Division concluded that Appellant's physical presence in Palau was insufficient to meet the Constitutional residency requirement for candidacy to the OEK.

DISCUSSION

Appellant argues that the Trial Division erred in analyzing candidate residency separately from the Voting Rights Act and erred in its conclusion that Appellant was not a resident under the appropriate standard. This Court finds that the Trial Division was correct on both counts.

The proper interpretation of "resident" is a legal determination, and is thus reviewed *de novo* by this Court, as is the application of that standard to the uncontested facts of Appellant's circumstances. *Estate of Rechucher v. Seid*, 14 ROP 85, 88 (2007); *In re Kemaitelong*, 7 ROP Intrm. 94, 95 (1998).

A. The Application of the Voting Rights Act to Candidates

Appellant argues that candidate residency is evaluated the same as voter residency, under the Voting Rights Act. Appellant contends that *Ngerul* analyzed the candidate's residency status using the Voting Rights Act definition of resident and that the Trial Division erred in its refusal to do the same and in its interpretation of *Ngerul*.

1. Ngerul

The issue in *Ngerul* was whether continuous physical presence was required to fulfill the five year residency requirement for candidates in Article IX, Section Six. To answer this question, the *Ngerul* court looked to various sources, including committee reports of the Constitutional Convention, for guidance on the framers' intent. The history behind Article IX, Section Six supported a definition of resident which did not require continuous physical presence. As a source of further guidance, the *Ngerul* court looked at the Voting Rights Act and noted "[n]owhere does it require that a person live continuously within the jurisdiction to maintain the status of resident." 8 ROP Intrm. at 298. Because the First OEK, which passed the Voting Rights Act, had many members in common with the Constitutional Convention, the court gave "significant weight to their understanding of what the framers intended. . . ." *Id.* at 299. Informed by these sources, the *Ngerul* court concluded that living in Palau for the five years prior to the election is not required to meet the candidate residency requirements. The *Ngerul* court determined that the candidate was eligible to join the OEK without applying the Voting Rights Act definition of resident to the candidate.
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Accordingly, this Court rejects Appellant's argument that the *Ngerul* court analyzed the candidate's residency status using the Voting Rights Act definition of resident. The *Ngerul* court used the Voting Rights Act as a source to determine the framers' intent with regard to continuous physical presence, not as a binding definition of residency.

2. Authority of Voting Rights Act

This Court additionally determines that the Voting Rights Act residency guidelines do not govern candidate residency, although they were validly used to inform the issue in *Ngerul*. The Voting Rights Act references, as the source of its authority, Article VII of the Constitution, which allows the OEK to prescribe voter residency qualifications, and states "it is within the power of the national government to proscribe and define *elector* qualifications for the participation of citizens in all elections. . .." 23 PNC § 102(c) (emphasis added). The Constitution explicitly gives the OEK the authority to prescribe residency requirements for voters within constitutional boundaries. Candidate eligibility requirements, however, are already prescribed in the Constitution, in Article IX, Section Six. The interpretation of that provision and the word "resident" in that section is the job of the judiciary. *See Obketang v. Sato*, 13 ROP 192, 198 (2006); *Francisco v. Chin*, 10 ROP 44, 50 (2006) ("this Court [is] the ultimate interpreter of the meaning of the age, residency and citizenship requirements set forth in Article IX, Section 6."). As an exercise of its authority under Article VII, the Voting Rights Act is proper and valid; if it were an attempt to legislate an interpretation of "resident" as used in Article IX, Section Six, it would exceed the OEK's authority. This Court presumes that the legislature intended to pass a

valid act and construes an act to be constitutional, if possible. *Ngirengkoi v. ROP*, 8 ROP Intrm. 41, 42 (1999). Accordingly, the Voting Rights Act applies only to voters and this Court finds that "resident" as used in Article IX, Section Six is properly defined separately from the Voting Rights Act.

3. The Structure and Language of the Voting Rights Act

Even if it were proper to define constitutional language by reference to a statute, there is little evidence that the Voting Rights Act was intended to apply to candidates. As the Trial Division noted, the structure and language of the Voting Rights Act support the conclusion that the Act is only directed towards voters. There is one mention of candidates in the entire Voting Rights Act: 23 PNC § 107(c)(7), which states that a candidate's period of residency includes the date he established residency and excludes the date of the election. Appellant points both to that statement and to the general language in Section 107(c), that "residence and residency shall be determined for the purpose of national elections according to the following guidelines," as evidence that the Voting Rights Act must apply to candidates. 23 PNC § 107(c). However, this argument must fail; that provision does not claim to define "residence" for candidates, it only creates a rule that the election day cannot count as part of the five year residence period. Neither general language nor the one mention of candidates is sufficient to conclude that the entire statutory scheme was intended to include candidates.
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4. The Policy and Purpose of the Voting Rights Act

This Court also notes, as the Trial Division did, that suffrage is inherently different from running for office and it is both reasonable and unsurprising that restrictions on the two franchises would differ. While voting is a fundamental right of citizenship, holding, or running for, office is not; the reasons to limit restrictions on voting eligibility do not apply to candidate eligibility. The described "legislative findings and purposes" of the Voting Rights Act deal only with the right of suffrage and creating "uniform standards . . . for the exercise of the right to vote." 23 PNC §102. They do not address the creation of uniform standards for candidate eligibility. The name of the act itself indicates that it was meant for voters, not candidates.

The guidelines for residency contained in the Voting Rights Act provide for an unusually lenient understanding of what makes a "resident." After examining the legislative history of the Voting Rights Act, this Court has, in a prior case, concluded that the statute's drafters intentionally developed a novel meaning of resident, to provide "flexibility" and accommodate voters in circumstances "where economic realities have precluded the choice of a physical presence." *ROP v. Pedro*, 6 ROP Intrm. 185, 190 (1997) (quoting Standing Committee Report No. 282, Committee on Judiciary and Governmental Affairs, August 20, 1984, at p.2). This interpretation, when applied to voters, is consistent with the stated purpose of the statute to protect the exercise of the right to vote. However, the application of the Voting Rights Act definitions to candidates does not further that purpose. There is no indication that the legislators wanted these flexible definitions of residency to apply to candidates, allowing candidates who do not live in Palau to run for and hold office. While the right to vote is a fundamental right, which would justify such flexible eligibility guidelines, the right to hold office does not justify such

treatment.

The Presidential and Vice Presidential eligibility guidelines, contained at Article VIII, Section Three and at 23 PNC § 1101, echo those for OEK members, requiring an individual to be a citizen of Palau, not less than 35 years old, and "a resident of the Republic for the five years immediately preceding the election." If Appellant's argument succeeded and the Voting Rights Act applied to both candidates and voters, an individual who has not lived, worked, or housed their families in Palau for the past decades could nonetheless be eligible for the highest office in the Republic. It would be a strange and controversial public policy if the Constitutional Convention had intended to allow a person so removed from daily life in Palau to assume the presidency. Without any showing that such a policy was intended, the Court will not presume that an interpretation with such unlikely consequences is correct.

5. Summary

Because the Voting Rights Act cannot properly define a constitutional term, because it is directed only towards voters, and because the application of the Act to the rest of Chapter 23 would have unintended policy implications, this Court concludes that the Voting Rights Act, the statutory definitions and guidelines laid out in 23 PNC §§ 101-111, does not dictate candidate p.241 eligibility for office.

B. Proper Interpretation of "Resident" in Article IX, Section Six

Having determined that "resident" in Article IX, Section Six (and 23 PNC § 1103) is interpreted independently from the Voting Rights Act, the question remains how the Constitutional residency requirements for OEK candidates should be interpreted.

"When Constitutional language is clear and unambiguous, we must apply its plain meaning." *Tellames v. Cong. Reapportionment Comm'n*, 8 ROP Intrm. 142, 143 (2000). However, as the *Ngerul* court noted, resident is a word without a plain meaning; its meaning depends on the legal context in which it is used. 8 ROP Intrm. 295, 297 (2001). "[W]here the meaning of constitutional provisions is not entirely free from doubt, resort may be had to preceding facts, surrounding circumstances and other forms of extrinsic evidence, to ensure that the provisions are interpreted in consonance with the purposes contemplated by the framers of the constitution and the people adopting it." *Remeliik v. The Senate*, 1 ROP Intrm. 1, 5 (High Ct. 1981) (quoted by *Ngerul*, 8 ROP Intrm. at 297).

"A frequent problem [in determining the meaning of 'resident'] is distinguishing or equating residence and domicile."[1] Mellinkoff's Dictionary of American Legal Usage 559 (1992). Comparing the two terms, Black's Law Dictionary notes:

> *Residence* usu. just means bodily presence as an inhabitant in a given place; *domicile* usu. requires bodily presence plus an intention to make the place one's home. A person thus may have more than one residence at a time but only one

[1]"Domicile" is sometimes spelled "domicil."

domicile. Sometimes, though, the two terms are used synonymously.

Black's Law Dictionary 1335 (8th ed. 2004).[2] While "residence" can refer either to **a** place where one lives, or **the** place where one lives and considers to be home, in the context of election law, "residence" is presumed to carry the second meaning, that equal to "domicile." Restatement (Second) of Conflict of Laws § 11, cmt. k ("in the absence of evidence of a contrary legislative intent, 'residence'. . .is generally interpreted as. . .being the equivalent of domicil in statutes relating to . . .eligibility to hold office"). This is seen throughout American case law. *Oglesby v. Williams*, 812 A.2d 1061, 1068 (Md. 2002) ("resided," as used in Maryland's constitutional candidate eligibility guidelines means domiciled); *Basileh v. Alghusain*, 890 N.E.2d 779, 787 (Ind. Ct. App. 2008) (noting that the Indiana Supreme Court construes the residency requirement for gubernatorial candidates to be equivalent to domicile); *In re Shimkus*, 946 A.2d 139, 148 (Pa. Commw. Ct. 2008) (determining that "whether one uses the term residence or domicile, one's residence for purposes of p.242 qualifying for office must be a habitation where one has put down roots, not a place where one has hoisted a flag of convenience" and noting that, for constitutional purposes, "resident" must refer to one who has a "domicil"); *Perez v. Marti*, 770 So.2d 284, 289 (Fla. Dist. Ct. App. 2000) (interpreting "resident" in a state statute on candidate residency to mean "a person [who] has a fixed abode with the present intention of making it their permanent home").

Domicile is defined as "[t]he place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." Black's Law Dictionary 523 (8th ed. 2004). A person's domicil, or domicile, is "usually the place where he has his home," with home defined as "the place where a person dwells and which is the center of his domestic, social and civil life." Restatement (Second) of Conflict of Laws §§ 11, cmt. a, 12. *See also id.* at § 18, cmt. g. A person is understood to be domiciled in a place if they have two things: an actual residence in the particular jurisdiction and an intention to make a permanent home in the jurisdiction. 25 Am. Jur. *Domicil* §1.

Although previous Palauan cases have not used the term "domicile" to describe the proper interpretation of "resident" in Article IX, Section Six, it is consistent with their interpretation of the Constitutional term. The *Ngerul* court, looking at records of the Constitutional Convention, found indicators that the framers intended "resident" to carry a meaning akin to domiciliary: "a person who maintains a residence in 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." 8 ROP Intrm. at 298. *See also Francisco v. Chin*, 10 ROP 44, 46 (2003) (adopting the above definition for "resident" in Article IX, Section Six). This interpretation is also consistent with the Trial Division's analysis in this case: the court based its conclusion on the facts that Appellant lacked a residence in Palau and that his home, work, and family life take place in Saipan. Tr. Op. at 10.

Although past Palauan cases have treated this issue in similar ways, the precedent does

[2]The Voting Rights Act definition of "resident," as it has been interpreted, is more lenient than either of these two definitions in that it does not require recent bodily presence in Palau or the relevant state.

not provide sufficient uniformity or clarity to guide future candidates, future courts, or the Palau Election Commission.

This Court now states conclusively, based on the above authority, that "resident" in Article IX, Section Six is to be interpreted as equivalent to "domicile."

C. Analysis of Appellant as "Resident" Under Article IX, Section Six

Appellant asserts that he thinks, and has consistently thought, of Palau as his permanent home. Op. Brief at 17. He states that, for that reason, he has turned down offers to hold prominent legal positions in Saipan and has not purchased any property there. While intention plays a part in determining an individual's domicile, intention alone does not end the inquiry. "A person's domicile of choice is the state to which he is most closely related rather than in the state where he wishes to be domiciled." Restatement (Second) of Conflict of Laws § 18, cmt. g. Even if an individual intends to return to p.243 a place at some indefinite point or upon the occurrence of a future event, he may have established domicile in his current location, if he intends to "make a home at present" where he is. *Id.* at § 18, cmt. b.

Appellant does not have a residence in Palau. His clan owns land on Angaur, including his childhood home. However, when Appellant visits Palau, he stays in a hotel; he has not stayed in the house he describes as his "family home" for 25 years. Over the past twenty years that Appellant has lived in Saipan, Appellant has visited Palau for customary events and retained his membership in the Palau Bar Association, occasionally doing legal work in Palau. He has a business license in Palau, obtained in 2008, and paid taxes to the Republic of Palau that same year.

In contrast, Appellant has lived and worked in Saipan for twenty years. He has built a home for his wife and children and brought his mother from Palau to live there with them. Ninety-five percent of his legal business is conducted in Saipan, where he holds office space and advertises. Appellant has only handled two legal matters in Palau in the last five years.

These facts clearly show that Saipan is the center of Appellant's "domestic, social, and civil life." Restatement (Second) of Conflict of Laws § 12. Appellant explains that it was because of his wife's desire to take care of her parents that he established a home and legal practice in Saipan, raising his family and living there for decades. However valid a justification for moving to a place, that explanation does not negate his choice, exercised constantly over the last 20 years, to not reside in Palau. As the Restatement describes, for a place to be a person's domicile, "it is not essential that the place be the one where he would prefer to live, or to which he is sentimentally most attached." Restatement (Second) of Conflict of Laws § 18, cmt. b. Appellant has not shown that Palau is his domicile. For that reason, he is not a "resident" for the purposes of Article IX, Section Six of the Palau Constitution and not eligible to hold office in the OEK.

CONCLUSION

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The Trial Division's Order of October 8, 2008, determining that Appellant does not meet the residency qualifications for candidates, outlined in Article IX, Section Six of the Palau Constitution, is **AFFIRMED.**