Ngerul v. Chin, 8 ROP Intrm. 263 (2001)

THEOPHILUS NGERUL,
Appellant,

v.

ELIAS CAMSEK CHIN,
Cross-Appellant/Appellee,

and

REPUBLIC OF PALAU, through the ELECTION COMMISSIONER, and the NATIONAL ELECTION COMMISSION,
Appellees.

CIVIL APPEAL NO. 00-44
Civil Action No. 00-223

Supreme Court, Appellate Division
Republic of Palau

Argued: January 9, 2001
Decided: January 17, 2001

Counsel for Ngerul: Mark Doran

Counsel for Chin: Oldiais Ngiraikelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice.[1]

[1] Justice Salii disclosed a family relationship with Mr. Chin which would ordinarily disqualify her from serving on the panel. *See* 4 PNC § 304; *ABA Model Code of Judicial Conduct*, Canon 3E (1998). However, the litigants' joint request for an expedited appeal could not be granted unless Justice Salii sits on the panel, due to the absence or disqualification of other available judges. Thus we ruled before argument that, as a matter of necessity, Justice Salii may serve on the panel in the interest of granting litigants' request for an expedited appeal. In any event, our ruling today is consistent with the express stipulations of the litigants, who have agreed to waive Justice Salii's disqualification for the purpose of obtaining a ruling on the jurisdictional issue to which our decision is confined.

⊥264 MILLER, Justice:

The Trial Division dismissed the complaint and counterclaim herein on the ground that it lacked jurisdiction under the Sole Judge Clause of Article IX, Section 10, of the Constitution. We reverse and remand for further proceedings.

Background

Appellant Theophilus Ngerul brought this action to invalidate the Election Commission's certification of the candidacy and election of Elias Camsek Chin, the Cross-Appellant and Appellee here, to the Senate. Mr. Ngerul alleged that Mr. Chin had been a resident of Palau only since 1996 or 1997 and was therefore ineligible to hold office in the Olbiil Era Kelulau under Article IX, Section 6(3) of the Constitution, which provides, "To be eligible to hold office in the Olbiil Era Kelulau, a person must be . . . a resident of Palau for not less than five (5) years immediately preceding the election." Mr. Chin filed a counterclaim seeking a declaratory judgment that he met the residency requirement because he has always intended to make Palau his permanent residence even though he has only been living in Palau since 1997.

The Trial Division determined that it lacked jurisdiction over the issues presented and dismissed the case. The court determined that the Sole Judge Clause in Article IX, Section 10 of the Constitution vests exclusive authority over the elections and qualifications of the O.E.K. in the Senate and the House of Delegates and that the court therefore lacked jurisdiction to determine whether Mr. Chin met the residency requirement. The Sole Judge Clause provides, "Each house of the Olbiil Era Kelulau shall be the sole judge of the election and qualifications of its members." Palau Const. art. IX, § 10. Mr. Ngerul and Mr. Chin have both appealed.[2]

Discussion

Article X, Section 5, of the Constitution provides that "[t]he judicial power shall extend to all matters in law and equity." Here, Mr. Ngerul makes the not unusual claim that a government agency failed to act according to law, *i.e.*, that the Election Commission failed to carry out its responsibility to "investigate all candidates to ensure that all the qualifications of the office [they seek] have been met," 23 PNC § 1107, and, as a result, did not properly certify "the winning candidates for . . . the Senate." *Id.* § 1551. Mr. Chin asserts the contrary. Resolution of this dispute, which here requires construction of the term "resident" in Article IX, Section 6(3), falls squarely within the Court's constitutional authority to "say what the law is." *Kazuo v. ROP*, 1 ROP Intrm. 154, 160 (1984); *Remeliik v. Senate*, 1 ROP Intrm. 1, 4-5 (1981).

The question, then, is whether the Sole Judge clause of Article IX, Section 10, serves to restrict the Court's jurisdiction such that it is barred, in this or any case, from considering this issue. We think the answer is no. While we have reviewed the Trust Territory-era cases on which the trial court relied, *see Liberal Party v. Election Commissioner,* 3 TTR 293 (Tr. Div.

[2] The brief of the Republic of Palau in the Trial Division was struck on the ground that the Legal Counsel to the President lacks statutory authority to represent the government. The Republic did not file a brief on appeal.

1967); *Basilius v. Election Commissioner* , 5 TTR 290 (Tr. Div. 1970), we are not confident that they set forth the absolute rule that the trial court derived from ⊥265 them and concluded had been incorporated in the Palau Constitution. Although both cases mention the "sole judge" language contained in Secretarial Order No. 2882, and at times use broad language suggesting that the courts are wholly without jurisdiction in election matters, both also recognize that the courts did have at least "limited jurisdiction." *Liberal Party*, 3 TTR at 295, *Basilius*, 5 TTR at 293, and contain language suggesting not that the court was without any power to act, but that no relief was warranted or would be effectual in the particular circumstances of the case. *See Liberal Party*, 3 TTR at 295 ("There is no allegation as to how, if at all, any or all of the alleged irregularities affected the result of the election."); *Basilius*, 5 TTR at 295 ("Where it is alleged illegal votes were cast and it is not possible for either party to prove how the alleged illegal votes affected the results, the contestants, having the burden of proof, must fail."). We note finally, that both cases were decided in the Trial Division, and were later overruled, albeit after the promulgation of the Palau Constitution, by the Appellate Division of the High Court, which noted that "[t]here have been any number of decisions rendered in the Supreme Court and appellate courts of the United States, and various state courts, holding in fact the courts do have jurisdiction in election cases." *Chutaro v. Election Commissioner* , 8 TTR 209, 212 (1981); *see also id.* at 215 ("We hold that the High Court Trial Division cases cited, i.e., the *Liberal Party* and *Basilius* cases, are not in conformity with the majority rulings of the courts.").

Our own limited research within the expedited time frame for this appeal has turned up cases establishing that, notwithstanding constitutional language similar to Palau's "sole judge" provision, courts have found that they retained jurisdiction to decide issues relating both to the tabulation of election results, *see, e.g., Meyer v. Lamm* , 846 P.2d 862 (Colo. 1993) (en banc), [3] and the qualifications of candidates to run for office. *See State v. Dubuque*, 413 P.2d 972 (Wash. 1966) (en banc). [4] Of particular significance is the decision of the United States Supreme Court in *Roudebush v. Hartke* , 92 S. Ct. 804 (1972), which involved the question whether Indiana could proceed with a recount of an election to the U.S. Senate. The Senate had provisionally seated one of the candidates, but postponed a final determination until the pending lawsuit could be resolved. In ruling that the recount could not go forward, the District Court concluded that "in making judgments as to which ballots to count, the recount commission would be judging the qualifications of a member of the Senate" and would thereby usurp the Senate's power under the Article I, Section 5, of the U.S. Constitution, to be "the Judge of the Elections, Returns, and Qualifications of its own members." *Id.* at 810. The Supreme Court disagreed: "[A] recount can be said to 'usurp' the Senate's function only if it frustrates the Senate's ability to make an independent, final judgment. A recount does not prevent the Senate from independently evaluating the election any more than the initial count does. The Senate is free to accept or reject

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[3] In *Meyer*, the court held that a constitutional provision that "[e]ach house . . . shall judge the election and qualifications of its members" was not "an explicit limitation upon the subject matter jurisdiction of the district court to hear the instant election controversy," which involved the proper standards for counting write-in votes. *Meyer*, 846 P.2d at 871.

[4] In *Dubuque*, whose holding was limited to primary elections, the court rejected the argument that a provision that "[e]ach house shall be the judge of the election, returns and qualifications of its own members," "totally deprives the courts of jurisdiction to inquire into and pass judgment upon the eligibility of a candidate." *Dubuque*, 413 P.2d at 977.

the apparent winner in either count, ⊥266 and, if it chooses, to conduct its own recount." *Id*. at 811.

Roudebush is significant, in our view, because it upholds the jurisdiction of the court to act at least until the Senate has made a final determination in the matter: "Once this case is resolved, and the Senate is assured that it has received the final Indiana tally, the Senate will be free to make an unconditional and final judgment under Art. I, Sec. 5. Until that judgment is made, this controversy remains alive, and we are obliged to consider it." *Id*. at 808. We need not decide today whether this Court's jurisdiction continues even beyond the point where the Senate has reached a final decision whether to seat Mr. Chin. *Compare Roudebush* , 92 S.Ct. at 807 ("Which candidate is to be seated in the Senate is, to be sure, a nonjusticiable political question.") *with Akizaki v. Fong* , 461 P.2d 221, 223 (Haw. 1969) ("We hold that the courts are required by the Hawaii Constitution to be the forum and the final arbiter in such disputes."). [5] But we are confident, in light of *Roudebush* and the authorities discussed above, that at least until that time, "this controversy remains alive" and may properly be considered by the trial court. [6]

[5] In particular, we note that we have no occasion now to address the validity of the decision in *Elbelau v. Election Commissioner*, 3 ROP Intrm. 426 (Tr. Div. 1993), with which the trial court here disagreed. In *Elbelau*, the Trial Division declared that it retained its jurisdiction to consider the qualifications of Delegate Ngiraikelau even after the House of Delegates had decided to seat him. Even if the trial court were correct that this aspect of *Elbelau* was wrongly decided, a question which we obviously do not decide now, it would not affect our determination in the current circumstances where, neither at the time of the trial court's order, nor at this time, has the Senate made a final determination.

[6] Adhering to our usually practice of not deciding issues until they have first been addressed below, *e.g. KSPLA v. Diberdii Lineage*, 3 ROP Intrm. 305, 312 n.3 (1993), we decline Mr. Chin's invitation to address the merits of the dispute.