

HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW AND HAYNE JJ

FREDERICK HENK RUDOLPHY

PETITIONER

AND

PHILIP ROSS LIGHTFOOT

RESPONDENT

Rudolphy v Lightfoot [1999] HCA 61
10 November 1999
P22/1999

ORDER

Answer the question reserved in the stated case as follows:

Upon their true construction, do ss 355(e) and 358 of the Commonwealth Electoral Act 1918 (Cth) render the Petition (a) incompetent or (b) liable to be dismissed or (c) liable to be struck out?

Answer: The Petition is incompetent and is liable to be dismissed.

Representation:

J Courtis for the petitioner (instructed by Wojtowicz Kelly)

W S Martin QC with P C S van Hattem for the respondent (instructed by Freehill Hollingdale & Page)

Intervener:

D M J Bennett QC, Solicitor-General for the Commonwealth with C J Horan intervening on behalf of the Australian Electoral Commission (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Rudolphy v Lightfoot

Parliamentary elections (Cth) - Senate - Death of incumbent Senator from Western Australia - Choice of replacement Senator pursuant to s 15 of the Constitution - Court of Disputed Returns - Jurisdiction - Petition - Whether prescribed limitation period for filing petition is a jurisdictional requirement - Whether unconscionable to rely on jurisdictional requirement.

Constitutional law - Elections - Senate - Death of incumbent Senator from Western Australia - Choice of replacement Senator pursuant to s 15 of the Constitution - Procedure necessary to challenge validity - Court of Disputed Returns.

Practice and Procedure - Court of Disputed Returns - Jurisdiction - Petition - Whether prescribed limitation period for filing petition is a jurisdictional requirement - Whether unconscionable to rely on jurisdictional requirement.

The Constitution, s 15.

Commonwealth Electoral Act 1918 (Cth), Div 1 of Pt XXII, ss 353(1), 355, 358.

Judiciary Act 1903 (Cth), s 18.

Constitution Acts Amendment Act 1899 (WA), s 5.

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. This is
a Case Stated under s 18 of the *Judiciary Act* 1903 (Cth). The facts are in short
compass. By petition filed on 11 May 1999 ("the Petition"), the petitioner invokes
the jurisdiction of the Court of Disputed Returns under Div 1 of Pt XXII of the
Commonwealth Electoral Act 1918 (Cth) ("the Act").

2 The petitioner was duly qualified to vote in Senate elections in
Western Australia in May 1997. The relief sought in the Petition includes a
declaration of the invalidity of the choice on 19 May 1997 by the Houses of the
Parliament of the State of Western Australia of the respondent to the Petition,
Senator Lightfoot, to hold the place in the Senate rendered vacant by the death of
Senator John Panizza.

3 Section 15 of the Constitution relevantly provides:

"If the place of a senator becomes vacant before the expiration of his term
of service, the Houses of Parliament of the State for which he was chosen,
sitting and voting together ... shall choose a person to hold the place until the
expiration of the term. ...

The name of any senator chosen or appointed under this section shall be
certified by the Governor of the State to the Governor-General."

4 The notification of the choice of the respondent to hold the place of the late
Senator Panizza took place on or about 23 May 1997 when the Governor of
Western Australia certified to the Governor-General that the respondent had been
so chosen. The certificate was tabled in the Senate on 27 May 1997. The
respondent's term as Senator will expire on 30 June 2002.

5 The respondent contends that, by reason of s 355(e) of the Act, the latest date
for the filing of a petition was 40 days after 23 May 1997, namely 2 July 1997, and
that, as a result, the Petition is incompetent. In the statement of facts in the Petition,
the petitioner identifies what he says are certain facts respecting the composition
of the Legislative Council of Western Australia. These are said to produce the
consequence that on 19 May 1997 the Legislative Council was not constituted as
required by s 5 of the *Constitution Acts Amendment Act* 1899 (WA). The petitioner
contends that the result is that on 19 May 1997 the Legislative Council was not
capable of sitting and voting together with the Legislative Assembly to choose
Senator Lightfoot pursuant to s 15 of the Constitution.

6 The petitioner claims that the legal effect of these matters did not become
known to him until 20 April 1999 and that the Petition was filed within 40 days of

Gleeson CJ
Gaudron J
McHugh J
Gummow J
Hayne J

2.

that date. It is further contended that in the circumstances what the petitioner identifies as the limitation period of 40 days prescribed by s 355(e) of the Act had been suspended, and, further, that Senator Lightfoot would act unconscionably in placing reliance upon that limitation period in answer to the Petition.

7 Section 355(e) of the Act provides, subject to s 357 which is not relevant here, that:

"[E]very petition disputing an election or return in this Part called the petition shall:

...

(e) be filed in the Registry of the High Court within 40 days after the return of the writ; or, in the case of the choice or the appointment of a person to hold the place of a Senator under section 15 of the Constitution, within 40 days after the notification of that choice or appointment."

8 Further, s 353(1) states:

"The validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns and not otherwise",

and s 358 is in these terms:

"(1) Subject to subsection (2), no proceedings shall be had on the petition unless the requirements of sections 355, 356 and 357 are complied with.

(2) The Court may, at any time after the filing of a petition and on such terms (if any) as it thinks fit, relieve the petitioner wholly or in part from compliance with paragraph 355(aa).

(3) The Court shall not grant relief under subsection (2) unless it is satisfied that:

(a) in spite of the failure of the petition to comply with paragraph 355(aa), the petition sufficiently identifies the specific matters on which the petitioner relies; and

(b) the grant of relief would not unreasonably prejudice the interests of another party to the petition."

3.

9 The 40 day requirement in s 355(e) is thus one of the requirements which must be complied with if proceedings are to be had on the petition within the meaning of s 358(1). Section 355(aa) specifies the particularity of the content of the petition. Relief from compliance with this provision may be granted pursuant to s 358(2) and (3). These provisions were added by s 111 (as to s 355(aa)) and by s 113 (as to sub-ss (2) and (3) of s 358) of the *Electoral and Referendum Amendment Act* 1989 (Cth) ("the 1989 Act"). Their inclusion emphasises the imperative nature of the other provisions of s 355, including par (e)¹.

10 The requirement that the petition be filed within the 40 day period specified in s 355(e) is to be read with the limited disputation of any election or return permitted by s 353(1) and the interdiction in s 358(1) of proceedings on a petition unless requirements, including that in s 355(e), are complied with. Section 355(e) stipulates an essential condition or jurisdictional requirement for the Court of Disputed Returns. In particular, s 358(1) does not give rise merely to a defence of non-compliance which may be waived by a respondent to the petition or displaced by relief given by the Court of Disputed Returns.

11 The present is an example of legislation of the kind identified by Isaacs J in *The Crown v McNeil*² and by Windeyer J in *Australian Iron & Steel Ltd v Hoogland*³. The 40 day requirement does not, to adapt the terms used by Windeyer J, "bar an existing cause of action"; rather "[i]t imposes a condition which is of the essence of a new right"⁴.

12 The provision with respect to the 40 day period plainly is designed to produce criteria which are objective and certain and reflect the public interest in resolving expeditiously and with finality questions respecting disputed elections and returns. Further, there is a body of authority which predates the 1989 Act and establishes that, once the 40 day period has expired, it is not possible thereafter to amend the petition which has been filed within time so as to cure any non-compliance with

1 Nothing turns upon the other sections referred to in s 358(1), ss 356 and 357. The first of these deals with the provision of security for costs and the second with a petition filed by the Australian Electoral Commission.

2 (1922) 31 CLR 76 at 100-101.

3 (1962) 108 CLR 471 at 488-489.

4 (1962) 108 CLR 471 at 488. See also *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265 at 276-277; *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 130-131, 156.

Gleeson CJ
Gaudron J
McHugh J
Gummow J
Hayne J

4.

the requirement of s 355. The reasoning underlying those decisions is that to permit amendment would in effect permit evasion of the requirement that the petition in a final form be filed within the 40 day period. Those cases do not in terms specify the 40 day requirement as a jurisdictional requirement but, as indicated above, that is how the matter should be understood.

- 13 The authorities to which we refer commence with the reasons of Griffith CJ in *Cameron v Fysh*⁵. More recently, in *Re Barry Ceminchuk*⁶, Dawson J dismissed an application seeking an extension of time within which to file a petition. After referring to s 355(e) and s 358, Dawson J said that the applicant had been unable to point to anything giving power to the Court of Disputed Returns to waive the requirements of s 355(e). His Honour continued⁷:

5 (1904) 1 CLR 314 at 316.

6 Unreported, Court of Disputed Returns, 28 October 1993.

7 Unreported, Court of Disputed Returns, 28 October 1993 at 2-3.

5.

"In *Cameron v Fysh*⁸, *Re Berrill*⁹, *Nile v Wood*¹⁰, and *Sykes v Australian Electoral Commission*¹¹, it was held that amendment of a petition is not possible if to do so would in effect evade the requirements of s 355(e). These cases assumed that the requirements of s 355(e) cannot be dispensed with. That was the express decision of Toohey J in *Robertson v Australian Electoral Commission*¹².

The applicant urged that s 364 of the Act gives me power to make the orders he seeks. That section provides that:

'The Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities, or whether the evidence before it is in accordance with the law of evidence or not.'

Broad as that provision may be, it does not confer a jurisdiction on the Court which it does not otherwise have under the Act. Nor does it dispense with the requirements of the Act. It merely requires that the Court should not be unduly formal or technical in the conduct of proceedings under the Act and enables it to depart from the rules of evidence."

- 14 It follows that the present Petition is incompetent and should be dismissed. The question posed by the Case Stated should be answered accordingly. The question of costs of the Case Stated should be for the Justice disposing of the matter.

8 (1904) 1 CLR 314 at 316.

9 (1978) 52 ALJR 359 at 360; 19 ALR 254 at 255.

10 (1988) 167 CLR 133 at 137.

11 (1993) 67 ALJR 714 at 716-717; 115 ALR 645 at 648.

12 (1993) 116 ALR 407 at 408-409.