

FEDERAL COURT OF AUSTRALIA

Mubarak v Australian Electoral Commission [2018] FCA 1089

File number: WAD 312 of 2018

Judge: **BARKER J**

Date of judgment: 16 July 2018

Catchwords: **ADMINISTRATIVE LAW** – urgent application to have name included on ballot paper and list of nominated candidates for by-election – where less than 100 electors entitled to vote at the election for which the candidate was nominated signed nomination form – where no substantial compliance under s 172(2) of the *Commonwealth Electoral Act 1918* (Cth) – application dismissed – no order as to costs

Legislation: *Commonwealth Electoral Act 1918* (Cth) Pt XIV, ss 93(2), 162, 166, 170, 172, 175, 176
Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012 (Cth)

Cases cited: *Noah v Campbell* [2007] FMCA 2128

Date of hearing: 16 July 2018

Registry: Western Australia

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 42

Counsel for the Applicant: The Applicant appeared in person

Counsel for the Respondents: Mr PR Macliver

Solicitor for the Respondents: Australian Government Solicitor

ORDERS

WAD 312 of 2018

BETWEEN: **KIM MUBARAK**
Applicant

AND: **AUSTRALIAN ELECTORAL COMMISSION**
First Respondent

MANDIE CUEVAS
Second Respondent

JUDGE: **BARKER J**

DATE OF ORDER: **16 JULY 2018**

THE COURT ORDERS THAT:

1. The applicant's name be formally amended to be "Kim Mubarak".
2. The first respondent's name be formally amended to be the "Australian Electoral Commission".
3. Mandie Cuevas be added as second respondent.
4. The application be dismissed.
5. No order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BARKER J:

1 These are my reasons given orally on 16 July 2018, and slightly edited, for dismissing the applicant's application for orders against the respondents.

2 The applicant, **Mr Kim Mubarak**, is aggrieved by the failure of the respondents to include his name on the ballot paper for the forthcoming by-election in the Division of Perth. This by-election is to be held on 28 July 2018, a short time away from now. This application, as a result, has been brought on urgently, and I have heard from the parties today and now deliver this *ex tempore* judgment.

3 Mr Mubarak has made a number of submissions as to why he considers the refusal of the respondents to accept his nomination and declare him a nominated candidate for this by-election to be unlawful or, to put it another way, to be legally wrong.

4 Mr Mubarak has also made a number of submissions about how the nomination process works and whether or not it is fair or, as he put it, discriminatory against a person like him who is not endorsed by a political party, as well as about the way the nomination system worked out in this particular case.

5 I should make some preliminary observations. It is accepted by the parties that the *Commonwealth Electoral Act 1918* (Cth), as amended, relevantly governs the nomination of persons who are otherwise qualified to seek election to nominate for the by-election. In effect, a person who has reached the age of 18 years, is an Australian citizen, and otherwise is an elector entitled to vote, in this case, at a House of Representatives election, or a person qualified to become such an elector, can put their name forward for election.

6 But the *Commonwealth Electoral Act* then proceeds to set out in Pt XIV a number of requirements governing nominations of persons for election as members of the House of Representatives and the Senate. Here, we are dealing with Mr Mubarak's desire to be declared as a candidate for election as a member of the House of Representatives.

7 Section 162 provides no person shall be capable of being elected as a member of the House of Representatives unless duly nominated.

8 Section 166 provides, in effect, that, unless at the time of nomination the person is a sitting independent in the previous Parliament, or has filed the appropriate nomination form and set out their name, place of residence and occupation, and obtained the signatures of not less than 100 electors entitled to vote at the election for which the candidate is nominated, their nomination cannot be accepted.

9 Section 170 provides that the nomination paper for the House of Representatives election is to be given to the Australian Electoral Officer or the Divisional Returning Officer (**DRO**), as the case may be, after the issue of the writ for the election and before “the hour of nomination”, together with a deposit in the sum of \$1,000 (either in legal tender or in a cheque drawn by a bank or other financial institution on itself).

10 Section 172(1) then goes on to provide:

Subject to subsections (1A) and (2), the nomination shall be rejected by the officer to whom it is made if, and only if, the provisions of section 166, 167, 170 or 171 have not been complied with in relation to the nomination.

11 Subsection (1A) is not presently relevant to the application before me, but in the course of submissions, particularly by Mr Mubarak, subs (2) has been made the key issue on this application. It provides:

No nomination shall be rejected by reason of any formal defect or error in the nomination if the officer to whom the nomination is made is satisfied that the provisions of sections 166, 167, 170 and 171 had been substantially complied with.

12 I pause here to remark, insofar as this dispensing power is concerned, that it is: (1) to be exercised by the officer to whom the nomination has been directed, that is, on the facts before me, by the DRO; and (2) the officer has to be satisfied that, in the event of any formal defect or error, the relevant provisions have been substantially complied with.

13 So, in effect, the application made by Mr Mubarak before me primarily alleges in substance that in deciding that there has not been substantial compliance the DRO either misdirected herself as to the appropriate substantial compliance test or made some other legal error in the exercise of that statutory dispensary power or discretion.

14 Before I go any further, I should state what the facts of the case are going to the substantial compliance issues. Mr Mubarak has supported his application with his account of what happened in [1] to [5] of his affidavit, as follows (attachments not included):

1. I am the applicant and authorised in my capacity as Independent Candidate to

make this affidavit on the matter of my nomination to campaign.

2. On 4th July, 2018, submitted my nomination forms annexure KM1-EFO60/MK2-EFO60, Nomination by 100 electors KM3-EFO60-C1/KM3-EFO60-C21 and Single Nomination of unendorsed check KM4-EFO60-C all checked and received by Officers of the AEC at address: Level 13/200 St.Gorges Terrace WA 6000.
 - (a) Late in the Evening received a call from the Officer asking me to submit more 38 electors tomorrow before 12:00pm closing time.
3. On the 5th July, 2018, Complied and submitted a form with 38 electors in time before 12:00 pm.I asked the officer if she needed more names? Her response was no.I left the office after a while an officer of the AEC rang me to come back and pay the fees of \$1000 for my nomination. Annexure AEC Receipt KM5 was issued in time before 12:00 pm closure of nominations. Everything was received and signed in time. Annexure KM2-EFO60. I stand my position on substantial compliance.
4. At a later stage about 2:00 pm after the closing of the nominations, was informed by DRO and her staff that I won't be allowed to campaign because they have just discovered from the 133 names of electors submitted to the AEC only 4 of them are not electors of Perth. 'I was wrongly rejected', and had no choice rather than giving them my objection in writing. Annexure KM6-1/KM6-2.I believe that, I had complied with the Australian Electoral Commission act 1918, sec.170.sec.171, sec.167 and sec.166 on substantial compliance before 12:00 pm.
5. I pray to this Honourable Court to Order the Australian Electoral Commission include my name 'KIM MUBARAK' on a ballot Paper and in the list of nominated Candidates Federal House of Representatives for the by-election of the seat of Perth, election due on 28 July, 2018.So I pray your Honour.

15 In short, he says that he made an initial attempt to finalise his nomination on 4 July 2018. He received advice that he was 38 elector signatures short. The next day, 5 July 2018, he attempted to overcome the deficiency and provided additional electors' names and signatures and paid the nomination deposit of \$1,000. He says he was subsequently advised that he was four electors' signatures short of the 100 required and so his nomination was not accepted.

16 I should here note formal matters which govern an understanding of how the *Commonwealth Electoral Act* operates in this case. 5 July 2018 becomes important for the following reasons. On 15 June 2018, the Speaker of the House of Representatives issued a writ for the by-election in the Division of Perth with polling to take place on Saturday, 28 July 2018. The writ specified that the close of nominations was on 5 July 2018. By reason of the operation of s 175 of the *Commonwealth Electoral Act*, the hour of nomination to which I referred earlier is specified to be 12 o'clock noon on the day of nomination. So that was the relevant cut-off date and time for nominations – 12 o'clock at noon on 5 July 2018.

17 The process that Mr Mubarak explains he adopted is confirmed in substance by the affidavit of Ms June Ann Bell made 16 July 2018, filed on behalf of the respondents. Ms Bell is the Western Australian site manager and nominations project manager for the Australian Electoral Commission. At [6] to [15] of her affidavit (attachments not included) she states:

6. The applicant sought to be nominated for the Division of Perth and attended the Commission on 4 July 2018 with a nomination form that comprised 15 pages with a total of 95 names. Copies of those pages are marked as pages 1-15 of annexure 'KM3-EF060-c' to the applicant's affidavit in this matter affirmed on 10 July 2018 (the applicant's affidavit).
7. I instructed 2 staff of the Commission to go through the names and addresses in the applicant's form which resulted in 62 being identified as being on the Commonwealth electoral roll and eligible to vote in the by-election for the Division of Perth.
8. On 4 July 2018 at approximately 5.00 pm I advised the applicant that he had insufficient eligible electors as only 62 names were on the electoral roll for the Division of Perth and entitled to vote.
9. The applicant returned to the Commission on 5 July 2018 at approximately 11.38 am with a further 6 pages with a total of 38 names. Copies of those pages are marked as pages 16-21 of annexure 'KM3-EF060-c' to the applicant's affidavit.
10. The additional 38 names and addresses were checked by staff of the Commission who identified only 31 as being on the Commonwealth electoral roll and eligible to vote in the by-election for the Division of Perth. Ms Mandie Cuevas, the Divisional Returning Officer for the Division of Perth and I then went through and checked all the names who could not be found on the electoral roll for the Division of Perth and found that 3 names from the original 15 pages were on the electoral roll. The combined total of electors eligible to vote in the by-election for the Division of Perth who signed the applicant's nomination totalled 96 (65 plus 31) which was less than the 100 electors required by s 166(1)(b)(i) of the Electoral Act.
11. Ms Cuevas and I then advised the applicant in the afternoon of 5 July 2018 that his nomination did not meet the requirement that it be signed by not less than 100 electors entitled to vote in the by-election for the Division of Perth and, therefore, his nomination had to be rejected.
12. The applicant then wrote a letter of objection dated 5 July 2018, a copy of which is annexed to the applicant's affidavit and marked 'KM6-1/KM6-2'.
13. Annexed to this affidavit and marked 'JAB-2' is a copy of the email sent by Mr Paul Pirani, Chief Legal Officer of the Commission, to the applicant on 6 July 2018 in response to his letter dated 5 July 2018.
14. Annexed to this affidavit and marked 'JAB-3' is a copy of the file record that I made on 5 July 2018 in relation to this matter. I affirm that the contents of my file record are true and correct.
15. Annexed to this affidavit and marked 'JAB-4' is a copy of the file record that was made on 5 July 2018 by Ms Cuevas in relation to this matter. I affirm that the contents of Ms Cuevas' file record are true and correct to the extent

that it refers to matters where I was also present. In relation to events where I was not present, the file record is true and correct to the best of my knowledge, information and belief.

18 In essence, by way of confirmation of what Mr Mubarak has said, she explains that on 4 July 2018, Mr Mubarak attended at the Perth office of the Australian Electoral **Commission** with a nomination form that comprised 15 pages. She instructed staff to go through the names and addresses of the electors whose signatures appeared on it. This resulted in 62 being identified as being on the electoral roll and eligible to vote at the by-election for the Division of Perth.

19 I interpolate here to observe that it is not just any group of people who can elect members of Parliament throughout the Commonwealth of Australia whose signatures are required to support a nomination, but, by virtue of s 93(2) and the requirements of s 166, those electors who sign must be entitled to vote at the election in which the candidate is nominated with their names appearing on the electoral roll; that is to say, in this case, eligible to vote in the by-election for the Division of Perth.

20 Ms Bell instructed her staff to go through the names to see if they were electors in Perth. It resulted in only 62 being identified as eligible to vote on that basis. She says that on 4 July 2018 at about 5 o'clock in the afternoon, she advised Mr Mubarak that he had insufficient eligible electors and that only 62 were on the electoral roll.

21 Mr Mubarak then returned to the Commission on 5 July 2018 at about 11.38 am with a further six pages and a total of 38 names. Ms Bell confirms the documents then received at the Commission by reference to some of those attached to Mr Mubarak's affidavit. Mr Mubarak paid his \$1,000 deposit at about the same time. The receipt for the \$1,000 attached to Mr Mubarak's affidavit is marked as 11.56 am, four minutes before the 12 o'clock noon cut-off time.

22 I infer from the evidence, that what then happened was that, after 12 o'clock, the Commission staff, including the DRO, **Ms Mandie Cuevas**, went through a process of verifying the additional signatures as electors in Perth. What they discovered was that only 31 of the additional 38 signatures were people who were eligible to vote in the Division of Perth by-election. However, they took a further step. They again went through the signatures previously provided and were able to identify three other persons who were in fact eligible to vote, but who had earlier been discounted.

23 But, unfortunately, from Mr Mubarak's point of view, the combined total of all the electors eligible to vote in the by-election for the Division of Perth who had signed his nomination on 4 and 5 July 2018, fell short of the 100 because they only totalled 96. I accept and find that that was the case on the evidence before me.

24 As a result of this count and recount, I infer that Ms Cuevas decided, as the DRO, that she could not be satisfied that there had been substantial compliance with the *Commonwealth Electoral Act* requirement that not less than 100 electors entitled to vote in Perth had given their support to Mr Mubarak's nomination.

25 Mr Mubarak wrote a letter of objection the next day, and that is annexed to his affidavit. There was a response from the Chief Legal Officer of the Commission as to the legal requirements surrounding the nomination process, discussing the facts and the substantial compliance test.

26 I will deal with issues that have been raised by Mr Mubarak today. At a more general level, Mr Mubarak has complained that there are different rules in the *Commonwealth Electoral Act* governing the nomination process for people who are endorsed by political parties and people who are unendorsed or independent candidates, like him. That is correct. But there would appear to be policy reasons for the differences. Some of them, I believe, are to be found express or implied in the parliamentary record relating to the amendments made to the *Commonwealth Electoral Act* in 2012-2013.

27 The Second Reading Speech on the *Electoral and Referendum Amendment (Improving Electoral Procedure) Bill 2012* (Cth) touches on some of those. At p 8159, of the House of Representatives Hansard, the Minister (the Honourable Gary Gray MP at material times) on 27 June 2012 said:

The amendments made by schedule 2 to the bill seek to address concerns arising from the increasingly large number of Senate groups contesting elections. They are proposed as a means of discouraging candidates who are not seriously in contention for election and thereby would reduce the number of candidates on ballot papers.

28 To some extent, that might have been addressed only to the Senate, but it is capable of being read more broadly. Towards the end of that page, the Minister added:

Schedule 2 to the bill will also address the number of electors required to nominate an unendorsed candidate from 50 to 100 electors. Unendorsed candidates are candidates who either are not endorsed by a registered political party or are not a sitting Independent candidate.

29 And over the page at p 8160, the Minister said:

The amendments to increase the required nomination deposit and to increase the number of nominators required for unendorsed candidates seek to strike the right balance between providing the opportunity for all eligible citizens to stand for parliament while at the same time putting in place some reasonable thresholds that candidates must meet; thresholds that will contribute to ensuring the effectiveness of the electoral process.

30 I note those parliamentary comments because they help to provide some policy rationale for why these provisions exist. One can infer from this record that the Parliament accepts that where a person who nominates has the endorsement of a political party, there has been some broader process of community endorsement of the nomination, but where they do not have political party endorsement, there ought to be a reasonable threshold of electors as their nominators and that 100 is considered by the Parliament of Australia to be the appropriate number. The broad attack on the fairness of that policy, which Mr Mubarak has raised, is not something, in any event, that aids the resolution of the legal issue now before me. I have not understood his objection to be one challenging the constitutionality of the relevant provisions of the *Commonwealth Electoral Act*, only its policy basis.

31 The real questions are (1) whether there was, in fact, compliance with the 100 eligible elector signature requirement; or (2) whether it can be said the DRO applied a wrong test in deciding there was not substantial compliance with that requirement.

32 There is no doubt every other nomination requirement was met by Mr Mubarak. The respondents' counsel does not suggest otherwise.

33 As I have already indicated, to the extent that Mr Mubarak argues that he provided 100 or more elector signatures, that is not good enough because the signatures need to be those of persons eligible to vote in the Division of Perth by-election. I accept the evidence put on by the respondents and, in particular, the information provided in the affidavit of Ms Bell which states that, in the end, there were only 96 such signatures on the nomination form, not the required 100.

34 The remaining question is the key question, namely, whether s 172(2) was misapplied by the DRO in rejecting the nomination. As noted earlier, that provision states:

No nomination shall be rejected by reason of any formal defect or error in the nomination if the officer to whom the nomination is made is satisfied that the provisions of sections 166, 167, 170 and 171 have been substantially complied with.

35 In this case, it is s 166(1)(b)(i) that is relevant, because that is the requirement that the nomination in the requisite form be signed by not less than 100 electors entitled to vote at the election for which the candidate is nominated. There is a question whether you can have substantial compliance with a provision in those terms. I have already emphasised that s 172(1) makes it clear that a nomination shall be rejected if there is not compliance, and I have found that there was not compliance. The question is whether it was open to the DRO to find there had been substantial compliance with that provision.

36 One submission put to me by the respondents is that the failure to have 100 signatures but to have supplied 96 cannot be described as a “formal defect” or a “formal error” in the nomination. Depending on what one considers to be a “defect” or an “error” in a nomination, it is possible to say that a failure to comply with the 100 signature requirement is a defect or an error. I am inclined to think, however that the failure to obtain the 100 signatures is neither a defect nor an error *in the nomination*. Rather it is a failure to satisfy a mandatory requirement in the nominating process.

37 Consistent with the decision of *Noah v Campbell* [2007] FMCA 2128, which has been cited to me on behalf of the respondents, I consider that the signatures requirement can only be substantially complied with if the 100 number is reached. There is a good reason why that should be so, because if substantial compliance can be demonstrated by a fewer number than 100, then exactly what is the relevant number? The Parliament has decreed at least 100 are required. The requirement is not for “about 100” or “nearly 100”, or a number that in the discretion of the relevant officer is thought to be sufficient to demonstrate some general community support for the person who wishes to campaign. It has to be “not less than 100”.

38 Thus, I do not consider that the substantial compliance provision in s 172(2) has been incorrectly interpreted or applied by the officer in this instance.

39 The result is that I do not consider that this is an occasion in which the Court should make any orders which would have the effect of requiring the DRO to reconsider her decision not to accept Mr Mubarak’s nomination for Perth or to require his name to be placed on the ballot paper.

40 Finally, I would note that I do not doubt that the Court has full jurisdiction to determine this matter. It is a matter arising under an Act of the Commonwealth of Australia. The Court has

full jurisdiction to compel the performance of the duty or to correct an error made by a Commonwealth officer in the present circumstances.

41 For these reasons, I would dismiss the application for relief.

42 In the circumstances, I would not make any order for costs against Mr Mubarak.

I certify that the preceding forty-two (42) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker.

Associate:

Dated: 20 July 2018