IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-604
[2023] NZHC 2827

BETWEEN	NEW ZEALAND LOYAL Applicant
AND	ELECTORAL COMMISSION First Respondent
AND	ATTORNEY-GENERAL Second Respondent

Hearing: 6 October 2023

Counsel: M Hague for Applicant
D J Perkins and S Cvitanovich for Respondents

Judgment: 9 October 2023

JUDGMENT OF ISAC J
[Application for judicial review]

Introduction

[1] In five days' time the 2023 general election will take place, determining the composition of the House of Representatives for the next three-year term. The applicant, New Zealand Loyal, is a registered political party contesting the election. In this urgent proceeding it seeks judicial review of what it says is a decision of the Electoral Commission to refuse to accept an amended party list. New Zealand Loyal seeks an urgent mandatory order requiring the Electoral Commission to accept and publish "updated election information" which, in effect, would increase the number of its list candidates from the three accepted by the Commission to 36. Given advance voting has already begun, the applicant says that with each passing day its position in the election is prejudiced without publication of the amended list. Should the party win an electorate seat, or exceed the five per cent threshold, the existing party list would likely see some seats in Parliament New Zealand Loyal would otherwise have filled allocated to a different party.

[2] The Electoral Commission is an independent statutory body charged with conducting elections impartially, efficiently and effectively in accordance with the Electoral Act 1993. It opposes the application for review. It says that the Electoral Act contains an unqualified requirement in s 127(3)(a) for a party list to be submitted before noon on 14 September 2023. After that deadline, a political party may only withdraw its party list, but it may not submit a new one. Amending the party's list at this point would involve a breach of clear statutory requirements that apply to all political parties. It argues that it has no power to accept amendments to a party list after the deadline and, for the same reason, the Court has no power to grant the relief New Zealand Loyal seeks.

[3] These proceedings were filed on 5 October 2023 and served on the respondents that day on a Pickwick basis. As the duty judge I held a teleconference with counsel to determine the appropriate way forward. Counsel for the Commission, Mr Perkins, suggested that given the need for urgency, the Court should determine a preliminary question of law said to underpin the applicant's first ground of review, as it relates to the mandatory order. Mr Hague, counsel for New Zealand Loyal, agreed with the sense

of that approach, as did I. There was some refinement to the question, but the parties agreed on the following formulation:[1]

> If the facts pleaded by New Zealand Loyal are assumed to be true, can the Court make an order requiring the Electoral Commission to accept party list placement information relating to electoral candidates that was submitted after noon on Thursday 14 September 2023?

[4] The parties are also agreed that if the answer to this question is "no", the remaining relief sought, which are declarations of illegality, are less time-critical and can be dealt with after the results of the general election are known. This approach has the advantage of ensuring the parties can remain focussed on the election itself, and the result may determine whether there is any further need for the assistance of the court. It is only if the answer to the preliminary question is "yes" that a further urgent trial to determine disputed facts will be required.

[5] It also follows that the hearing and my consideration of the preliminary issue proceeds on the basis of the facts pleaded by New Zealand Loyal and on those set out in an affidavit in support by its party secretary, Michele Smith. It is also important to record that the claims and allegations of the party are not accepted by the Electoral Commission, which has not had an opportunity to file evidence in opposition or a statement of defence.

What happened in the present case?

[6] Before turning to outline the applicant's case it is helpful to begin with an overview of the legal requirements for registration of party list and electoral district candidates contained in the Electoral Act.

[7] Part 6 of the Electoral Act sets out the requirements for general elections. It provides two pathways for candidates to secure nomination to stand for Parliament. The first involves a "personal" nomination for an electoral district under s 143. This requires the candidate to be nominated by not fewer than two registered electors of the

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1 The reason for this formulation is because the primary argument in the second ground of review is that the Applicant did not submit an amended party list. Rather, it was correcting an omission relating to the bulk nomination list and this correction was permitted by s 146H(1) of the Electoral Act 1993.

district and requires a nomination form together with the candidate's consent to be lodged with the Returning Officer "not later than noon on nomination day".[2] Nomination day in relation to the 2023 general election is 15 September 2023.[3]

[8] The second pathway is through a nomination provided by the secretary of a registered political party. The Act permits a secretary to nominate candidates through the submission of a party list containing candidates' names under s 127 of the Act, and by the submission of a "bulk nomination schedule" for constituency candidates under s 146D. Importantly, both party lists and bulk nomination schedules must be lodged with the Electoral Commission "not later than noon *on the day before nomination day*".[4] In other words, nomination of candidates by a party secretary must be completed a day earlier than the "personal" nomination pathway. There is no argument in this case that both forms of nomination by a party secretary were required to be submitted to the Commission before noon on 14 September 2023.

[9] The Electoral Act also provides that the Commission "must reject" a party list or bulk nomination schedule that is not lodged "by noon on the day before nomination day".[5] There is no element of discretion about this requirement. Parliament's clear intention was to provide a hard deadline by which point, as Mr Perkins submitted, certain facts must crystallise. While the Act contemplates that changes might be made to the information contained on both forms of party nomination prior to the deadline, none can occur after it. This reflects one of the objectives of the Commission contained in s 4C of the Act, to maintain confidence in the administration of the electoral system. Confidence is maintained by removing any element of discretion from the Commission in favour of strict timeframes set out within the Act itself.

[10] Against this statutory framework the Electoral Commission has designed an online portal as a tool to assist registered parties and their secretaries to comply with

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2 Electoral Act 1993, s 143(4).

3 The "nomination day" for each election is set by writ issued by the Governor-General: s 125 of the Act. Section 3 defines "nomination day" as "the day appointed in the writ as the latest day for the nomination of candidates". On 10 September 2023, the Governor General signed the writ for the general election, which provided that "the last day and time for the nomination of constituency candidates is noon on 15 September 2023": "Writ for General Election" (10 September 2023) *New Zealand Gazette* No 2023-vr4258 https://gazette.govt.nz/notice/id/2023-vr4258.

4 Sections 127(3)(a) and 146D(3)(b) (emphasis added).

5 Sections 128(1)(b) and 146G(1)(c).

the requirements of the Act. Ms Smith's affidavit provided as an exhibit the Commission's Party Secretary Nominations Manual for the 2023 general election. The Manual set out the following guidance to party secretaries in relation to entering candidate information into the portal:

> **Step 3.** Enter in the candidate's details
>
> For a candidate contesting both an electorate and the party list you only need to enter their details once. Make sure that you select the electorate they are contesting **and** enter their list number
>
> **Note**: The system will notify you if you add two candidates for the same electorate or same list preference
>
> If the candidate is **Electorate Only**
>
> - Remember to select the electorate they are contesting
> - Leave the 'list number' field blank
>
> **Note**: Electorate only candidates will only be included in the bulk nomination schedule and not in the party list
>
> If the candidate is **List Only**
>
> - Leave the 'electorate contesting' field blank
> - Remember to enter a list number
>
> **Note**: list only candidates will only be included in the party list and not in the bulk nomination schedule

[11] The Manual also includes a screenshot of the portal page where candidate details are entered. In addition to data entry options for a candidate's personal information, there are two fields identified as "electorate contesting" and "list number". The former field appears to be a drop-down box from which a secretary can select the relevant electorate, while the latter is an empty text field enabling the secretary to type in the appropriate party list number.

[12] It is clear from the Manual that for each candidate the portal provides three options. The first relates to candidates contesting "both an electorate and the party list". For these candidates the secretary is advised that they only need to enter the candidate's details once, but that they should make sure to both "select the electorate they are contesting **and** enter their list number". The other two options relate to electorate and list only candidates. The Manual records that the secretary should only fill in the relevant electorate or list field, and leave the other blank.

[13] The portal then produces both a party list and a bulk nomination schedule using the information entered by the party secretary. Both documents are required to be printed, declared by the secretary before a justice of the peace or solicitor, and uploaded to the portal in order to complete submission of nominations.

[14] In the present case, Ms Smith provided the completed declarations to the Commission on 14 September 2023 prior to the noon deadline.[6] As noted, the party list contained three candidate names. At 2.04 pm the same day, Ms Smith sent an email to an employee of the Commission in which she recorded, amongst other things:

> Also, thank you for your massive effort and help throughout the nomination process - you've been a legend!
>
> I will be inputting some candidates via the individual candidate nomination process as well with cut off time of midday tomorrow, Fri 15th.

[15] This appears to have been a reference to the submission of nominations using the personal nomination process for electorate candidates. However, the Electoral Act provides that where a party secretary has given notice to the Commission of an intention to bulk nominate constituency candidates, no Returning Officer may accept a nomination under the personal pathway.[7] No doubt for this reason, the Commission advised Ms Smith the same day by email that she would be unable to do so. Some further exchanges followed, during which the Commission's staff reiterated to Ms Smith that as the statutory deadline for submission of the party list had closed, it was not possible to add further names to the list.

New Zealand Loyal's claim

[16] That brings me to New Zealand Loyal's claim. The statement of claim sets out three grounds of review. Ultimately, they all relate to what is said to be the "decision" of the Electoral Commission to refuse to accept candidate party list rankings after noon on 14 September 2023.

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6 Although there is no evidence as to the precise time, Mr Perkins' memorandum of 5 October 2023 recorded that the party list was submitted "at approximately 11.56am on Thursday 14 September [2023]".

7 Electoral Act, s 146C(2).

[17] The first ground of review—the "service quality" ground—is essentially an allegation that the Commission failed for a period of time to provide Ms Smith with access to the portal, failed to adequately train her, and issued confusing or inaccurate information in the Manual about the use of the portal. More particularly the statement of claim alleges that:

(a) An initial training teleconference on 29 August 2023 on the use of the portal was inadequate and provided no explanation of the New Zealand electoral system, particularly in relation to "the important distinction between party list and electoral candidates". Nor did the training call address "how the bulk nomination process was to be administered".

(b) The Manual provided by the Commission "incorrectly" stated that the details for a candidate standing both for an electorate and on the party list only had to be entered once.

(c) There were "significant delays and difficulties" caused because the Commission "failed to properly set up the Online Portal". The statement of claim and Ms Smith's evidence are not entirely consistent on this point. The pleading alleges that "the Secretary was eventually able to access the [portal] on 9 September". However, Ms Smith's affidavit explains that after the training call on 29 August, she was "not able to properly access the portal until or about 6 September 2023" due to the portal "not having been set up properly". Her evidence does not address what occurred during the six-day period between 29 August and 4 September. Her affidavit also records that she uploaded the first "batch" of nine New Zealand Loyal candidates to the portal between 5 and 8 September 2023.

(d) Prior to the cut-off for submission of the party list, the Commission was provided with candidate consent forms that indicated the candidate "was an electorate and list candidate", but the Commission returned these forms on the basis that the form had been completed incorrectly.

(e) Relevantly, the statement of claim pleads that on 14 September 2023 the party leader provided the secretary with a list of candidates that included "candidates who were electoral and list candidates, with their electorate and order of preference for the party list". However, Ms Smith's affidavit does not provide the relevant communications and list, instead recording only that "the party list with the electorate candidates included is at [exhibit MS-16]. This is the final version list that the [Commission] refused to accept". However, there is no evidence she submitted the amended party list to the Electoral Commission.

(f) It is also alleged that prior to noon on 14 September, the secretary entered candidate information into the portal "[f]ollowing the direction in the Manual". It is said "[t]here was no space on the form downloaded to indicate where the order of preference [for the party list] should be inserted, only space for the electoral seat number". This is said to have caused Ms Smith to be "confused by the guidance contained in the Manual" and as a result she "entered only the electoral information of the electoral and list candidates into the Online Portal, but not the number of their order of preference in the party list".

[18] As a result of these allegations, New Zealand Loyal submits that the Commission caused it not to file a correct party list on time.

[19] The second and third grounds of review raise questions of law. The second ground of review, which is the principal argument advanced by the applicant, is that s 146H(1) of the Act permitted a party secretary, up until noon on 15 September 2023, to amend the bulk information schedule. Mr Hague's contention is that the portal effectively collapsed the distinction between the schedule and the party list because it required the candidate information for those nominated for both a constituency seat and the party list to be entered once. It follows, in his submission, that the failure to provide the relevant party list information can be cured under s 146H, which relevantly provides:

146H Amendment of bulk nomination schedule

(1) If the secretary of a party lodges a bulk nomination schedule with the Electoral Commission by noon on the day before nomination day, the secretary may, at any time before noon on nomination day, provide to the Electoral Commission any information necessary to remedy any defect or omission in the schedule, or in any document required to be lodged with the schedule.

[20] The applicant's case is that the secretary's failure to enter the candidates' party list ranking in the portal is a "defect or omission" in the bulk nomination schedule or a document "required to be lodged with the schedule".

[21] Alternatively, the second ground of review relies on s 128C of the Act, which relates to the withdrawal of a party list. It provides:

128C Withdrawal of list of candidates

(1) A secretary of a political party may, by giving signed notice, withdraw a list of candidates submitted under section 127.

(1A) The notice must—

(a) be in a form that the Electoral Commission has approved; and

(b) be witnessed as specified in the form.

(2) No withdrawal of a list of candidates under subsection (1) shall have any effect unless it is lodged with the Electoral Commission not later than noon on the date specified in the writ for the election of constituency candidates as the latest date for the nomination of constituency candidates.

(2A) If a list of candidates is withdrawn under subsection (1), the deposit paid under section 127A must be returned to the party secretary, unless the party secretary submits another list of candidates in accordance with section 127.

(3) Where a list of candidates is withdrawn under subsection (1), the party secretary may submit another list of candidates in accordance with section 127.

[22] Mr Hague argues that s 128C(3) permits a party secretary to resubmit the party list as a free-standing entitlement until noon on 15 September 2023, and in particular one that is not constrained by the deadline in s 127(3)(a) requiring party lists to be filed by noon the day before. He submits this interpretation is justified by the use of the words "in accordance with" instead of "under" in subs (3).

[23] The third ground of review rests on s 12(b) of the New Zealand Bill of Rights 1990. It is said that the Commission's decision not to permit additional party list ranking information (or perhaps more accurately, a refusal to accept a revised party list) after noon on 14 September limited New Zealand Loyal's candidates' right of participation in the general election as a party list candidate contrary to s 12(b).

First ground of review: can the Court grant the mandatory order sought?

[24] Within New Zealand's constitutional arrangements Parliament is the supreme law maker. The courts, as a branch of government, are required to interpret and apply statutes to give effect to Parliament's intention. Unlike some jurisdictions with an entrenched constitution, it is not open to a court to suspend or ignore an Act of Parliament.

[25] Parliament commonly delegates to ministers and officials powers and discretions to be exercised for the public good. These are usually subject to limits set out in the empowering legislation or otherwise imposed by the common law. In this context the courts have an important constitutional function to perform: they supervise the exercise of public power through judicial review to ensure those powers are exercised within their limits. This supervisory jurisdiction is itself a reflection of parliamentary sovereignty. It ensures that ministers and officials act in accordance with limits imposed by Parliament. It also gives effect to another important constitutional principle, that of executive accountability to the Parliament.[8]

[26] These constitutional principles are also reflected in the limits on relief—both interim and final—available in judicial review proceedings. In *McLennan v Attorney-General*, Hammond J considered an application for interim relief relating to the offer back requirements in the Public Works Act 1981.[9] That Act prescribed a 40-day period during which a former land-owner from whom land had been compulsorily acquired had the right to accept an offer back from the Crown. The statutory time period for acceptance was due to expire, and Mr McLennan applied for

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8 *Regina (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 at [41]–[47].

9 *McLennan v Attorney-General* HC Auckland M267/98, 13 March 1998. See also *Logan v Minister for Land Information* [2021] NZHC 945 at [30]–[31].

an interim order suspending the lapse of the offer pending resolution of three issues by the Court.

[27] Although Hammond J concluded it was a case where normally the Court would grant interim relief to preserve the status quo, he declined to do so. The reason was that if the Crown's offer back was valid, it expired *by statute*.[10] The Court had no power to alter a statutory period:[11]

> It comes to this. There is no warrant in this Court to alter the statutory period. No challenge has in fact been made to the exercise of the departmental discretion; and it is difficult to see how it could be. Once the statute is set in train, it runs. That is consistent with the decision of the Court of Appeal in *Horton*. Any declaration that the Crown ought not to take any further action, is pointless: there is no further action that the Crown could take…

[28] A similar jurisdictional limit is evident in the definitions of "statutory power" and "statutory power of decision" within ss 4 and 5 of the Judicial Review Procedure Act 2016. Section 4 of that Act defines a statutory power of decision as "a power or right" conferred by an Act or instrument to make "a decision" affecting rights. The existence of a power to make a decision is a threshold question. An Act of Parliament that merely prescribes a deadline by which certain acts must be completed does not involve the exercise of a power by an official, or the making of a decision. It is simply a function of the statute itself.

[29] In the present case, the Electoral Commission's refusal to accept party list information—or to permit an amended party list—after the statutory deadline is not the exercise of a power conferred by Parliament. It is a requirement of the Electoral Act, consistent with the clear intention of Parliament, to require registered parties to submit a party list before the prescribed time.

[30] While courts are not permitted to suspend acts of Parliament, the effect of the mandatory order the applicant seeks would do precisely that. Sections 127(3)(a) and 128(1)(b) could not be clearer: party lists were required to be submitted prior to noon on 14 September 2023, and the Electoral Commission must reject any list submitted that does not comply.

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10 At 15.
11 At 18.

[31] Even if the pleaded allegations are accepted at face value—that the Commission provided inadequate training and provided misleading or confusing information causing Ms Smith to enter the wrong data—that could never provide a basis on which a court could set aside the clear requirements of the Electoral Act. I agree with Mr Perkins that to provide a level playing field for all electoral participants and avoid unfairness, statutory deadlines must be rigorously observed. Rigorous observance is a principal means by which impartial, efficient and effective administration of the electoral system is achieved, and confidence in it is maintained.

[32] Accepting late nominations, in the form of an amended or resubmitted party list, could demonstrate partiality as between registered parties, or partiality as between candidates listed in different party lists. And as the respondent submits:

> Successful delivery of an election depends on deadlines being met. Ballot papers must be prepared. Party list information [is] distributed to voters and voting places. The accuracy of information provided to voters and candidates depends on the identity of those candidates being fixed and known.

[33] While acknowledging that it was not possible for the Court to suspend the requirements of the Electoral Act, Mr Hague submits that the mandatory order could be made in the exercise of the Court's equitable jurisdiction.[12] In particular, he submitted it could be made as a necessary "legal fiction", which would treat as a matter of fact the amended party list as though it had been submitted on time. No authority was cited to support the existence of such a significant jurisdiction. I agree with Mr Perkins that equity must always yield to an express legislative code. And in any case, in substance the form of relief boils down to the same thing: suspension of statutory requirements attaching to all political parties.

[34] Three things follow from these conclusions. First, the "decision" identified in the statement of claim—the Commission's refusal to accept party list information after the noon 14 September deadline—is not the exercise of a power of decision amenable to judicial review. Second, rather than lawfully requiring the Commission to exercise a power in the applicant's favour, the mandatory order in substance seeks to suspend or modify important statutory requirements Parliament has seen fit to impose. Third,

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12 Relying on the maxim that equity looks on that as done which ought to have been done.

even if some illegality could be made out, relief in the form of the mandatory order cannot be granted.

[35] This is not to say that the applicant is without a remedy. If it is ultimately able to establish the facts it pleads in support of the first ground of review, it might still be open for the court to make declarations of illegality. But it does clearly follow that the principal relief that has been sought cannot be granted as a matter of law.

[36] Finally, Crown counsel submits that 27 of the candidates on New Zealand Loyal's new party list have not consented to nomination as a party list candidate. Such consent is a condition of nomination.[13] If this is correct, it is a further fundamental barrier to the mandatory order the party seeks. An added difficulty is that the only evidence of New Zealand Loyal's amended party list is an exhibit attached to Ms Smith's affidavit. It is not clear when the exhibit was created, and there is no evidence it was ever submitted to the Electoral Commission. It appears likely it was only provided on 5 October, when Ms Smith's affidavit was served as part of these proceedings. Mr Perkins submits, with some force, that the exhibit is a slender basis upon which membership of the House of Representatives might be determined.

[37] It follows that the answer to the preliminary question is "no", and the Court cannot make the mandatory order sought whether or not New Zealand Loyal is able to establish its factual allegations at trial in support of the first ground of review.

Second ground of review: the legality challenge

[38] The second ground of review was Mr Hague's primary argument at the hearing. It raises two questions of law. The first asks whether s 146H(1) of the Electoral Act required the Electoral Commission to accept a party list (or revised "party list information") submitted after noon on Thursday 14 September, but before noon on Friday 15 September. Alternatively, it asks whether s 128C requires the Electoral Commission to accept the withdrawal and resubmission of a party list after noon on Thursday 14 September, but before noon on Friday 15 September.

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[13] Electoral Act 1993, s 127(4)(a). Compare with s 146E(3)(a), which requires consent to nomination as a constituency candidate.

[39] Mr Hague's argument based on s 146H(1), while novel, is clearly untenable.

[40] The Act makes a clear distinction between a party list submitted by a secretary under s 127, and a constituency candidate bulk nomination schedule submitted under s 146H. The latter cannot be conflated with the former or vice versa.

[41] Section 146H may only be used to amend bulk nomination schedules of constituency candidates—and even then, only in limited respects. That ss146B–146L (including s 146H) are specific to the bulk nomination of constituency candidates, and not party lists, is clear from s146A:[14]

> **146A Purpose of sections 146B to 146L**
>
> Sections 146B to 146L provide an alternative to the procedures set out in section s 143 to 146 by which people can be nominated as candidates for election for electoral districts.

[42] Nor did the portal conflate the two statutory pathways for candidate nomination by a party secretary, contrary to the applicant's argument. Entering candidate information in the portal does not constitute submission of a party list. A further step is still required.

[43] The portal used the candidate information supplied by the party secretary to generate a draft party list. If that list was wrong or incomplete for any reason, it was clearly open to Ms Smith, in accordance with s 127(3)(b), to prepare a correct list and lodge it with the Commission "by hand, post or electronically", provided she did so before the deadline. Instead, she appears to have printed the draft party list generated by the portal using the information she supplied, made the relevant declaration before a justice of the peace, and then submitted the list to the Commission. In doing so, it is hard to avoid the conclusion that she adopted the party list as correct at that time.[15]

[44] Nor am I able to accept Mr Hague's argument based on s 128C. That provision refers to s 127 in three places. Subsection (3) expressly states that where a party list

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14 It is also clear from the heading of s 146H: "Amendment of bulk nomination schedule".

15 Regardless, the Commission could not alter the legal requirements of the Electoral Act by providing a portal that was inconsistent with them, so even if there was some legal irregularity with the design of the portal, it could not assist the applicant in relation to the mandatory order.

has been withdrawn, the party secretary may submit another list "in accordance with section 127". This clearly includes s 127(3)(a), which required submission of the party list no later than noon on 14 September 2023. I am unable to accept that there is any distinction in substance between a requirement to lodge a party list "under" s 127, and one that is filed "in accordance with" that provision, as Mr Hague submitted.

[45] I have therefore concluded that the second ground of review cannot succeed as a matter of law, and the applicant is not entitled to the relief it seeks in reliance of that ground.

Third ground of review: qualification for Parliament and the right in s 12(b) of the Bill of Rights

[46] The third ground of review did not receive any significant attention from Mr Hague at the hearing.

[47] The statement of claim pleads that the "decision" of the Commission not to accept an amended party list after the statutory deadline has prevented the applicant's "electoral candidates from gaining a list vacancy" should the party gain sufficient votes, and made it "less likely that voters will give [the applicant] their party vote". As a result, it is claimed that the decision limited the right in s 12(b) of the Bill of Rights that every New Zealand citizen over the age of 18 years is "qualified for membership of the House of Representatives".

[48] For the reasons advanced by the respondents, I am not persuaded that this ground of review raises an arguable question of law.

[49] Section 12 of the Bill of Rights provides:

> **12 Electoral rights**
>
> Every New Zealand citizen who is of or over the age of 18 years—
>
> (a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
>
> (b) is qualified for membership of the House of Representatives.

[50] On the basis of the applicant's pleadings and evidence, I am not satisfied that s 12(b) is engaged. Qualification for membership of the House of Representatives is regulated by s 47 of the Electoral Act. It provides:

> **47 Registered electors may be members, unless disqualified**
>
> (1) Subject to the provisions of this Act, every person who is registered as an elector of an electoral district, but no other person, is qualified to be a candidate and to be elected a member of Parliament, whether for that electoral district, any other electoral district or as a consequence of the inclusion of that person's name in a party list submitted pursuant to section 127.
>
> (2) Notwithstanding anything in subsection (1), if a person is disqualified for registration as an elector, that person shall not be qualified to be a candidate or to be elected.
>
> (3) Regardless of anything in subsection (1), a person is not qualified to be a candidate or to be elected unless he or she is a New Zealand citizen.

[51] There is no suggestion New Zealand Loyal's candidates have been deprived of their qualification for membership of the House as a result of the inability to change the party list. That they are qualified has been confirmed by the acceptance of their nominations as constituency candidates. Here the issue is not the right of qualification under s 12(b) of the Bill of Rights, but the temporal requirement of the Electoral Act to submit party lists by the specified date and time.

[52] The procedural provisions of the Electoral Act regulate how a person qualified for membership of the House may be elected to it. Those procedural provisions do not limit their qualification; they simply regulate the process by which they might convert qualification into membership.

[53] Even if s 12(b) was engaged, the Commission's refusal to accept late nominations was "prescribed by law". That law is the Electoral Act, which does not provide for the amendment of party lists, and only permits the withdrawal and resubmission of such lists before noon on Thursday, 14 September 2023.

[54] Finally, there is no pleading and no evidence to suggest that the Electoral Act's temporal limit on the submission of party lists is unreasonable or one that is not demonstrably justified in a free and democratic society in terms of s 5 of the Bill of Rights.

Conclusion and result

[55] For the foregoing reasons:

(a) The answer to the preliminary question at [3] above is "no", and the application for a mandatory order—whether interim or final—is dismissed.

(b) To the extent the first ground of review seeks declaratory relief, the application for judicial review is adjourned to a date after the results of the election are known. This will provide New Zealand Loyal with an opportunity to consider whether the issues it raises on the first ground of review still require a determination by the court.

(c) The second and third grounds of review raise questions of law which I have answered against the applicant and they are also dismissed.

[56] While this result may be disappointing to New Zealand Loyal, it does not affect its existing party list, or its constituency candidates, who will compete in the general election.

[57] Finally, while criticisms have been made in the submissions and evidence of the applicant of the Commission's staff, it is difficult to reconcile those criticisms with Ms Smith's apparently unprompted expression of appreciation on 14 September 2023 for the helpful assistance they provided her in relation to the nomination process. Unfortunately, it seems that compilation and submission of the party list and bulk nomination schedule was left to the last minute. The onus is plainly on a registered party to ensure submission of statutory documentation in time. As Simon France J

once observed, if you leave it to the last minute, and something goes wrong, the responsibility falls squarely on the party.[16]

[58] Costs are reserved. I also reserve leave to apply.

[59] The proceeding should be allocated a case management conference at the first available date after the results of the general election have been declared.

Isac J

Solicitors:
Frontline Law, Wellington for Applicant
Crown Law, Wellington for Respondent

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[16] *Docherty v Peden, Chief Electoral Officer* HC Wellington CIV-2008-485-002375, 6 November 2008 at [39].