

**THE PRINCIPAL IMMIGRATION OFFICER
&
THE ATTORNEY GENERAL**

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v

ZHAN HONG CHEN

[HIGH COURT, 1990 (Palmer J) 9 February]

Appellate Jurisdiction

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Immigration- entitlement to passport- whether retention of confiscated passport justified- Passports Act (Cap 89) Sections 3, 6, 7, 15.

The Respondent's passport was confiscated by the first Appellant on the ground that there was reason to doubt his declared place of birth. On appeal against an order of the Magistrates' Court that the passport be returned the High Court HELD: dismissing the appeal, that a seized passport may only be retained as long as is reasonably necessary for enquiries to be completed and may not be retained indefinitely purely for the purpose of preventing a passport holder from leaving the country.

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Cases cited:

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Crystal Clear Video Limited v. Attorney General of Fiji (Civ. Action No. 331 of 1988)

Ghani and Ors v Jones [1969] 3 All E.R. 1700

Ratu Jone Madraiwiwi for the Appellant

H.M.Patel for the Respondent

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Appeal to the High Court from the Magistrates' Court.

Palmer J:

This is an appeal against a Judgment of H.C.Patel Esquire Resident Magistrate of Suva concerning the seizure of the Respondent's Passport by the First Appellant. The Grounds of Appeal are as follows:

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1. That the Court failed to properly evaluate the evidence before making the declaration that Respondent's passport be returned to him.
2. That the Court erred in fact and in law in failing to properly consider the legal submissions raised in defence by the Appellants before the Magistrate's Court.

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The basic facts are brief and not in issue. They are that the Respondent arrived from Tonga on 5th June 1989 and was at that time in possession of a Fiji passport

A in his name - N0.278346. The Immigration authorities detained him and impounded the passport which was subsequently handed over to the Police for the purposes of investigation. The Respondent says that he is a businessman and that he was booked to travel to Australia and Hong Kong on the 9th of June but having had his Passport impounded re-booked himself for the 17th June. However as at the date of Hearing this appeal the Passport had not yet been returned to him notwithstanding the Order of the Learned Magistrate. The crux of the matter is the Respondent's assertion that he is a Fiji Citizen, having been born in Rakiraki B on the 8th September 1961. The Appellants case is that there is a suspicion and/or reason to doubt the existence or genuineness of the birth certificate relating to the Respondent and therefore his citizenship. On that basis it is argued that the Respondent may have obtained his Passport by fraudulent means.

C At the hearing before the Learned Magistrate there was Affidavit evidence by the Respondent the effect of which I have already indicated. There were also Affidavits sworn on behalf of the Appellants and I will refer to those in a moment. In the circumstances by consent the Learned Magistrate adjourned the matter when originally called, for the purposes of hearing oral evidence. The Respondent's oral evidence supported the statements in his Affidavit. He explains some of the details of the impounding of his Passport and being interviewed by the Police on a number of occasions. He says that his birth was registered by his parents. He D said: "I am sure I signed the application for the Fiji Passport in China, the particulars in the application forms are all true, my date and place of birth are mentioned therein." He said in cross-examination that he collected the Fiji Passport in Hong Kong from an agent a few days before he came here. He said that he was also a Chinese Citizen and that he also held a Chinese Passport. He travelled to E Fiji on the Chinese Passport and not the Fiji one because he had left China on the Chinese Passport.

Evidence was given on behalf of the Appellants by one Anil Kumar, a Clerical Officer attached to the Births Deaths and Marriages Section of the Ministry of Justice in Suva. His Affidavit evidence which he re-asserted when giving oral evidence was to the effect that he had made the appropriate searches for an entry F relating to the Respondents birth as claimed by the Respondents but that he had failed to locate any registration details of such a birth ever having been registered.

There was also Affidavit and oral evidence by one Akapusi Qera the Director of Immigration in the Ministry of Home Affairs. He deposes that the Respondent when requested to produce his birth certificate to his department to establish his G birth in Fiji had failed to do so. He says in paragraph 4(IV):

"It is believed that the birth certificate which was used to procure the Fiji Passport was obtained by fraudulent means and thus the Fiji Passport No. 278346 issued in Suva on the 1st May 1989 was also obtained by fraudulent means."

THE PRINCIPAL IMMIGRATION OFFICER &
THE ATTORNEY- GENERAL v ZHAN HONG CHEN

He admits that the Passport is currently in his custody under the powers vested in him by the Passports Act (Cap. 89). During oral evidence this witness said that on the grounds stated in his Affidavit he had reasons to believe that the Respondent is not a Fiji Citizen. He explains that

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“Before Passport (Fiji) is given a standard application form is filled in, this requires further evidence of birth certificate or registration certificate. After a Passport is issued a file is kept but this particular file is missing, I have searched but cannot locate.”

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He said that birth certificates are usually returned and no photocopies are usually retained. He said that the Respondent's Passport was seized because upon leaving for Tonga on 3rd June 1989 he completed a Departure Card which contained the information that he came to Fiji on a Chinese Passport.

He said

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“Passport was confiscated because of suspicion that it may not be properly obtained.”

He also said

“we searched the Passport rackets but we were unable to trace it. We called the Police subsequently and they took over. Police are still investigating.”

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He said in cross-examination that while the file was missing now “it was definitely there then”, which I take to mean at the time when the application was lodged. He said that the file was handed to one Josua Mucunabitu, an Immigration Inspector. He explained an application for a Passport goes through three or four or five people. He agreed in cross-examination that these four or five people were happy or satisfied with the birth certificate before final approval of the Passport which was issued I May 1989. He also said “to my knowledge nothing has been found on this accused (sic).”

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The Passport Officer Josua Mucunabitu gave evidence as follows:

“In May 1989 I did see an application by Plaintiff for Fiji Passport. I kept it aside for further investigation. Passport was given subsequently by someone else.”

In cross-examination he said he was suspicious about the birth certificate.

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The Appellants also called one Aisea Volau, an Immigration Inspector who said:

“In May 1989 I received application for Passport from the Plaintiff. I remember it was lodged by someone who is known to me. I checked application, there was a birth certificate with it. On the face of it it

HIGH COURT

was in order - I was suspicious and I referred to Passport Officer for the background to be checked. I passed the application to Josua Mucunabitu.”

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Finally, evidence was given by one Waise Tavakace who said that he was an Investigating Officer. He said he was instructed in the matter on the 20th June 1989 but the Police itself had been informed earlier. He had a number of interviews with the Respondent and also with other witnesses. He said: “I have reasonable grounds for believing offence has been committed by more than one person”. He also said that he had reasonable grounds to believe that the Plaintiff is in some way implicated. He said “the investigations ought to be completed by two weeks as of today.” I note that he was speaking on 13 July 1989.

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He also said that he was aware that the whole Immigration file on this was missing, but they were still searching.

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The Learned Magistrate had before him an application by the present Respondent for an Order that his Passport be returned. He dealt first of all with the nature of that particular application and a submission that if an Order were made in the terms sought this would be in the nature of a mandatory injunction on the state and would therefore be contrary to the provisions of the Crown Proceedings Act Cap 24 Section 15. Reference was made to a Ruling to that effect by this Court in Crystal Clear Video Limited v. Attorney General of Fiji, Civil Action No.331 of 1988. Following the course adopted in that case by Fatiaki J. the Learned Magistrate decided to deal with the Respondent's application as a prayer for a declaration that the Passport seized is unlawfully detained and that it ought to be returned to him forthwith. In the appeal before me no point was taken as to that approach to the case.

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The Passports Act (Cap. 89) provides in Section 3 (1):

“The Passport Officer shall, upon application made to him in the appropriate form, issue to any Citizen of Fiji who satisfies such conditions as may be prescribed, a passport in the appropriate form.”

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Section 15 provides that the Minister may make Regulations inter alia prescribing the conditions to be satisfied for the issues of Passports, and Regulations 2 provides for the material that has to be supplied with an application for a Passport. In the present case there is evidence that the application for the Passport was made in the proper form and accompanied by the prescribed materials and that the Passport was therefore regularly issued. There has been no evidence produced that there was any irregularity in the issue of the Passport. The Appellants' case, as indicated at the outset, is that there is a suspicion that the Respondent is not entitled to a Passport because he is not a Citizen, on the grounds that he was not in fact born in Fiji. However the only piece of evidence in support of that proposition is of a negative character, namely that no entry of birth has been found. It has been

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THE PRINCIPAL IMMIGRATION OFFICER &
THE ATTORNEY- GENERAL v ZHAN HONG CHEN

agreed in evidence that the Immigration file on the Respondent is missing. Counsel for the Respondent submits with some justification that the file relating to this birth certificate may equally be missing and account for the fact that no record can be found.

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The Learned Magistrate in a reserved judgment of some length reviewed the history of the matter and the evidence given before him in detail. As to the first ground of appeal I am satisfied that the Learned Magistrate properly evaluated the evidence before making his declaration and that ground therefore fails.

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Section 6 of the Passports Act makes it an offence for any person for the purpose of obtaining a passport to make any representation or statement which he knows to be false or calculated to misled in a material particular, etc... I have no doubt if the Respondent had obtained this Passport by means of, for example, a forged birth certificate he could be charged under that section.

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Section 7(1) of the Passports Act is as follows:

“It shall be lawful for the Passport Officer, any Immigration Officer or Police Officer to take and retain possession of any Passport in any case where he has good reasons to believe that the Passport is in the wrongful possession of any person, or that the Passport has been obtained by means of any false or misleading representation or of any statement that is false or calculated to mislead in a material particular.”

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Counsel for the Appellants is relying on the powers contained in Section 7. Counsel also prays in aid the provisions of Section 106 (1) of the Criminal Procedure Code, Cap 21. However that section deals with the cases where a Search Warrant has been issued and incorporates the notion that any article seized pursuant thereto is brought before the Court, which thereupon has the control of the object. But its provisions as to the return of the thing seized are not without interest.

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In the present case there is no question of any seizure by virtue of a Search Warrant. The particular problem of the position when something is seized when no one has been arrested or charged was dealt with in detail by the Court of the Appeal in England in the case of Ghani and Others v. Jones [1969] 3 All E.R. 1700). In that case Lord Denning MR on p.1705 specifically adverted to the position when no one had been arrested or charged. That case was itself concerned with the seizure of the Passports of the three Appellants. His Lordship, said at letter C, : “What is the principle underlying these instances? We have to consider, on the one hand, the freedom of the individual. His privacy and his possessions are not to be invaded except for the most compelling reasons. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime. Honest Citizens should help the Police and not hinder them in

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A their efforts to track down criminals. Balancing these interests, I should have thought that, in order to justify the taking of any article when no man has been arrested or charged these requisites must be satisfied:" and he then went on to give five separate criteria. The fourth of these is directly applicable to the present case and is stated as follows:

B "The Police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or it is decided not to go on with it, the article should be returned."

Further on his Lordship said, after dealing with the submissions as whether there were reasonable grounds:

C "In any case, they have held them quite long enough. They have no doubt made photographs of them, and that should suffice."

I mention here the fact that in that case the Passports had been in the hands of the Police for a period of two months.

D Finally, on p.1706 Lord Denning in a salutary statement which could not be clearer said this:

E "I cannot help feeling that the real reason why the Passports have not been returned is because the officers wish to prevent the Plaintiffs from leaving this country pending Police enquiries. That is not a legitimate ground for holding them. Either they have grounds for arresting them, or they have not. If they have not, the Plaintiffs should be allowed to leave even if it means they are fleeing from the reach of justice. A man's liberty of movement is regarded so highly by the law of England that it is not to be hindered or prevented except on the surest grounds. It must not be taken away on a suspicion which is, not grave enough to warrant his arrest."

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G The other Justices of the Court of Appeal agreed. In the present case it is perfectly clear that no charge has yet been laid against the Respondent in respect of this matter. The terms of the opening word of Section 7 of the Passport Act appear to be open ended. The Act does not say how long the passport may be retained. I enquired of Counsel for the Appellants whether the submission was that the Immigration Authorities having seized a Passport may retain it indefinitely. I was told that was so, subject only to there being no abuse. It is not necessary for the purpose of the present matter for me to determine that particular submission, but I would say that if that were the case I would be prepared to find that there had been abuse, in the fact that the Passport has been withheld a matter of now seven months with no evidence as to the state of the enquiries except that given in

THE PRINCIPAL IMMIGRATION OFFICER &
THE ATTORNEY-GENERAL v ZHAN HONG CHEN

the Magistrates' Court that they would be concluded within two weeks from the date of that hearing. I would respectfully adopt the words of Lord Denning referred to above.

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Returning then to the second ground of the appeal the Learned Magistrate, after considering the evidence carefully considered the legal position including a reference to the case I have cited above. He said in one part of his Judgment:

“On the probability I have to decide whether it is fair or lawful for the Police to detain the Passport of the Plaintiff, who says on oath that he is a Fiji Citizen, for such length of time without laying any Charges. I weigh this against the suspicions of the Police who say that their enquiries are incomplete and Immigration Officers who said the whole file is missing.”

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In the result the Learned Magistrate came to the view that the Police were not entitled to hold the Passport any longer. In my view the Learned Magistrate properly considered the submissions raised and committed no error of fact or law. Moreover the position as it existed when he made his decision has become substantially strengthened in favour of the Respondent by the further effluxion of time since, coupled with the failure to charge him.

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Accordingly the Appeal is dismissed. I re-affirm the declaration made by the Learned Magistrate that the Passport should be returned to the Respondent forthwith. The Appellants must pay the costs of this appeal.

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(Appeal dismissed).

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