

NATIONALITY AND CITIZENSHIP IN PAPUA NEW GUINEA

J. L. Goldring*

What is citizenship? Mr Tom Leahy, spokesman for the Administrator's Executive Council of Papua New Guinea has given the following account:—

"Citizenship is basic to the idea of a nation. It defines those people who are members of the nation. In most countries, citizenship establishes a person's rights as a member of the country and his obligations to the country. A person may for instance obtain the right to vote and to stand for election because he is a citizen. At the same time citizenship may impose upon him an obligation to defend his country in time of need. At least the holding of citizenship would indicate which people have a right to be regarded as permanent residents of a country and cannot, for instance, be deported for criminal defences."¹

This statement shows that citizenship is a rather vague concept, whose precise meaning will depend on the context in which it is used. It is, in addition inaccurate in some respects. The statement that 'all persons born in Papua are Australian citizens', while true, may imply that all persons born in Papua have the right to reside permanently in Australia. As can be seen from what follows, such people only have the right to reside permanently in the Territory of Papua, which is a very small part of Australia. And while Papua is a part of Australia for many purposes it is only those Australian citizens who were born in Papua who have the right to reside there permanently.

"Nationality" is similarly a vague concept. To a large extent, it is co-extensive with the concept of citizenship. Neither nationality nor citizenship are necessary elements of any system of municipal law, but both concepts presuppose the existence both of states and a system of international relations between states.² While some civil rights may be conferred by the status of a national or citizen, (such as the right to stand for, or vote in elections) many other civil rights are available to all persons, regardless of their national status. These include the right to bring court actions, the right to freedom from arbitrary arrest, and so on. Other civil rights, in Papua New Guinea, depend on the common law concept of domicile, which depends on a person's actual residence coupled with an intent to reside permanently in that place.³

However "citizenship" is a matter which is currently politically significant in Papua New Guinea. It is important because it is felt by many that the

* Lecturer in Law, Australian National University.

¹ House of Assembly Debates, 8 June, 1971, p. 4302.

² Parry, C., *Nationality and Citizenship Laws of the Commonwealth* Chapter 1.

³ *Winans v A.G.*, [1904] A.C. 287; *Hague v Hague* (no. 1) (1962) 108 CLR 230; Dicey & Morris, *The Conflict of Laws*, 8th Ed., chapter 8.

existence of a national status will assist in the development of a sense of national unity. It is also felt to be important because it is believed, perhaps erroneously, that citizenship may affect rights of residence in Papua New Guinea, particularly for people who were not born in Papua or New Guinea.⁴

In the House of Assembly several members, including some with little formal education have showed awareness that citizenship is important. They appear, however, not to understand what it means. They do see that rights of residence, electoral privileges and so on, are important and will become more important as Papua New Guinea approaches independence. They are aware that citizenship privileges would attract some people to Papua New Guinea who might otherwise not come to or remain in the country, and that some, at least, of these people would be of great assistance to an independent Papua New Guinea. Some⁵ have suggested 'dual citizenship' which, presumably, would allow, say, an Australian or a German to retain his Australian or German citizenship, yet at the same time to be a citizen of Papua New Guinea. Others,⁶ who represent all areas and all shades of political opinion in Papua New Guinea have opposed the concept of dual citizenship, but have made it clear that any person, regardless of racial or national origins, should be able to become a citizen of Papua New Guinea.

Citizenship in Papua and New Guinea at Present

At present, indigenous Papuans are, generally, Australian citizens. The Australian *Citizenship Act* 1948-1969 (Sec. 5(1)) defines "Australia" as including the Territories of Australia that are not Trust Territories. Papua comes within this definition. By Sec. 6 of the Act, it extends to Territories under the control of the Commonwealth. This means that certain provisions of the Act apply also to the Trust Territory of New Guinea: for instance, residence in that Territory counts as residence in Australia for the purpose of application by aliens to become naturalized Australian citizens.

Citizenship by birth and descent is covered by sections 10 and 11 of the Act: section 10 provides that any person born in Australia (i.e. including Papua) shall be an Australian Citizen by birth. Section 11 deals with citizenship by descent, and provides that a person born outside Australia may be an Australian citizen if his mother or father was an Australian citizen at the time of his birth (or, in the case of an illegitimate child, if his mother was at the time of his birth a person having the status of a British subject and is ordinarily resident in Australia or New Guinea), AND the birth is registered, normally within one year, at an Australian consulate. The case of the child of a Papuan parent (i.e. an Australian citizen) who is born in

⁴ House of Assembly Debates, 30th Aug. 1971, pp. 4501-4507, 3rd Dep. 1971 4615-6, 7th Sept. 1971, pp. 4676-4686.

⁵ Mr Warren Dutton, House of Assembly Debates, 30 VIII 1971 pp. 4502-3; Mr Paulias Arek, House of Assembly Debates, 30 VIII 1971 pp. 4504-5; Mr. Angmai Bilas, House of Assembly Debates, 7 XII 1971 pp. 4685-6.

⁶ Mr Percy Chatterton, House of Assembly Debates 30 VIII 1971 pp. 4501-2; Mr Michael Somare, House of Assembly Debates 30 VIII 1971 pp. 4503-4; Mr Paliu Maloat, House of Assembly Debates 30 VIII 1971 p. 4506; Mr Ebia Olewale, House of Assembly Debates 3 IX 71 pp. 4615-6; Mr Paul Langro, House of Assembly Debates 7 IX 71 pp. 4676-7; Mr Matiabe Yuwi, House of Assembly Debates 7 IX 71 pp. 4677-8; Mr Peta Lus, House of Assembly Debates 7 IX 71 pp. 4678-9; Mr Tei Abal, House of Assembly Debates 7 IX 71 p. 4680; Mr John Maneke, House of Assembly Debates 7 IX 71 pp. 4681-2; Mr Thomas Kavali, House of Assembly Debates 7 IX 71 pp. 4683-4; Mr Tom Leahy, House of Assembly Debates 7 IX 71 pp. 4684-5.

New Guinea, and whose birth is not registered within one year appears to be anomalous. To the writer's knowledge, there are no Australian consulates in New Guinea, however, a procedure does exist whereby an Australian citizen may register the birth of his or her child with the various Collectors of Customs in New Guinea. This is accepted as registration for the purposes of the Act.

Section 3A of the Act provides that the Minister (i.e. the Australian Minister for Immigration) may declare that persons who are under the protection of the Australian Government or the Government of certain other Commonwealth countries are "Australian protected persons". By Reg. 5(1) of the *Citizenship Regulations* it was declared that a person who was born in New Guinea and is not a British subject (all Australian citizens by virtue of secs. 7, 23C and 24 of the *Citizenship Act* have the status of British subjects) are Australian protected persons.

Therefore the position is that Papuans are Australian citizens, and New Guineans are Australian Protected Persons. It would seem that Papuans, like other Australian citizens by birth or descent, could not be deprived of their status as citizens except by legislation. New Guineans could be deprived of their status as Australian protected persons simply by the Minister's declaration.

Australian Citizenship and New Guineans at present

The *Citizenship Act* provides that persons who are not Australian citizens by birth or descent may become Australian citizens in various ways.

If a person is a citizen of any of a number of Commonwealth countries (and Pakistan) specified in Sec. 7 of the Act, he may become an Australian citizen simply by notifying the Secretary of the Department of Immigration in the prescribed form, provided he has resided in Australia (and/or New Guinea) for a certain period.⁷ There upon he is entitled to be issued with a Certificate of Citizenship. However, such a certificate may be revoked at any time by the Secretary without giving any grounds for his action.⁸ Citizens of the same Commonwealth countries who fulfil residence requirements (which are less stringent if they have served in the Armed Forces of the Commonwealth), who are of good character, who speak English, who have "adequate knowledge of the responsibilities and privileges of Australian citizenship" [sic] and who intend to reside in Australia permanently may become Australian citizens by registration.⁹ They may be deprived of their citizenship, but only in the same manner as naturalised citizens (see below).

An alien (i.e. a person who does not have the status of a British subject) or a protected person, is entitled, under Division 3 of the Act, to apply for naturalisation. Such an appellant must fulfil the same requirements as a Commonwealth citizen who seeks citizenship by registration. The Minister has an absolute discretion to waive the prerequisites or any of them, or to grant or withhold the application for naturalisation. If, in the exercise of his discretion, the Minister decides to grant the application, he issues a certificate of naturalisation, and the applicant becomes an Australian citizen from the date of his making an oath or affirmation of allegiance.

⁷ Secs. A-C *Citizenship Act* 1948-1969.

⁸ *Ibid.*, Sec. C(5).

⁹ *Ibid.*, Sec. 12.

These provisions do not exclude the possibility that a New Guinean could apply for, and be granted Australian citizenship. However, notwithstanding that a New Guinean did fulfil all the requirements in Sec. 12, i.e. that he was of good character, spoke English etc.—and naturally, by living in New Guinea, he had fulfilled the residence requirements, political considerations might influence the Minister not to grant the application for naturalisation.

May Australian Citizenship be lost?

As pointed out above, a Commonwealth citizen who becomes an Australian citizen by notification may at any time have his citizenship revoked by the Secretary's written notice.¹⁰

A citizen who is such by birth or by descent and who is of full age will only lose his Australian citizenship, if, by a voluntary and formal act, other than marriage, whilst outside Australia and New Guinea, acquires the nationality or citizenship of some country other than Australia.¹¹ If a citizen who is not of full age acquires the citizenship of another country, or if an Australian citizen acquires the citizenship of another country by marriage, he or she may renounce Australian citizenship by a declaration.¹² Service by any citizen in the armed forces of a country at war with Australia is sufficient to deprive him of his citizenship.¹³

It is clear that Australian policy is against the holding of 'dual citizenship' by its citizens. The exception would seem to be the Australian citizen who marries a citizen or national of a country whose laws provide that the spouse of a citizen or national of that country on marriage automatically acquires the citizenship of that country. The Kingdom of the Netherlands is such a country. However, many countries, including Australia and the United States of America, provide that the spouse of a citizen must, in order to obtain citizenship of that country, perform some voluntary and formal act, e.g. the making of an application for citizenship.

Nevertheless, it would be quite easy for Papua New Guinea, if its legislature so wished, to provide for some means, by which people not born in either Papua or New Guinea, to become citizens of the new nation. The solution adopted by Fiji¹⁴ is basically similar to the provisions of Secs. 11A-11C of the Australian *Citizenship Act* mentioned above. Citizens of certain Commonwealth countries who have lived for seven years in Fiji may become Fijian citizens by registration, provided that they do so within a specified period after independence. There is also provision for such citizens to lose their Fijian citizenship should they remain absent from Fiji for a specified period. Such citizens are otherwise analogous to Australian citizens who are citizens by registration.

It would also be possible for an independent Papua New Guinea to provide that a citizen of another country might also be a citizen of Papua New Guinea, subject to conditions of residence, good character etc. However, because of Sec. 17 of the *Australian Citizenship Act* 1948-69, an Australian citizen who took any formal and voluntary act to acquire Papua New Guinea citizenship would by that Act lose his Australian citizenship.

¹⁰ Ibid, Sec. C.

¹¹ Ibid, Sec. 17.

¹² Ibid, Sec. 17.

¹³ Ibid, Sec. 19.

¹⁴ Sec. 20(2) Fiji Constitution Sec. *Citizenship Act*, Fiji.

It is not only in the event of independent Papua New Guinea seeking this type of dual citizenship that legislation by the Australian Commonwealth Parliament would be necessary. As Papuans and New Guineans are now Australian citizens or Australian protected persons, respectively, an act of the Australian legislature would be necessary, at least in the case of Papuans, to alter their status. In fact, the matter is certain to be one which is the subject of consultation between the Government of Australia and the leaders of Papua New Guinea at the time of independence.

A citizen who is such by naturalisation or registration, by Sec. 20, loses his citizenship if he resides outside Australia or New Guinea for seven years, unless he is in the service of the Australian Government, an Australian employer, or an international organisation, or unless at least once in each year he gives notice of his intention to retain his Australian citizenship. In addition, by Sec. 21, where the Minister is satisfied that such a citizen is 'disloyal or disaffected', that he has traded with an enemy of Australia, that he obtained his naturalisation or registration as an Australian citizen by fraud, or that, at the time of his naturalisation or registration he was not of good character (whatever that may mean), or that the citizen was even sentenced to imprisonment for twelve months or more in any country, he may determine that such person shall cease to be an Australian citizen. Notice of the determination must be given to the person, who has the right to request a reference by the Minister to a Committee of Inquiry headed by a Supreme Court Judge.

The Benefits of Nationality or Citizenship

It can be seen that the concepts of nationality and citizenship are used interchangeably. One has a vague idea of what they control. However the *Citizenship Act 1948-1969*, while it defines how a person can be or become a citizen, says nothing about the attributes of nationality or citizenship. One might imagine that citizenship would automatically confer rights of residence, of obtaining a passport etc. In fact this is not the case.

Entry to, and residence in Papua New Guinea is the subject of the *Migration Ordinance 1963-1969*. By Sec. 6 of this Ordinance, any person who was not born in Papua New Guinea may not enter or remain in Papua New Guinea unless he has a valid entry permit. Entry permits may be issued by the Administrator. Sec. 46 of the Ordinance empowers the Administrator to require an applicant for an entry permit to give security or impose other conditions. By Sec. 7(1) the Administrator may in his absolute discretion cancel a temporary entry permit, without giving any reason for his action.

A person who is in Papua New Guinea without a valid entry permit becomes a prohibited immigrant who may be deported.¹⁵ In addition Section 12(3) of the Ordinance gives the Administrator in Council wide powers to order the deportation of a person who was not born in the Territory if:

- (a) his conduct (whether in the Territory or elsewhere) has been such that he should not be allowed to remain in the Territory; or

¹⁵ *Migration Ordinance 1963-69*, S.6, S.15.

(b) he is a person who

- (i) advocates the overthrow by force or violence of the established government of the Territory or of the Commonwealth or of a state or of any other civilised country or of all forms of law; or
- (ii) advocates the unlawful destruction of property; or
- (iii) is a member of an organisation which entertains and teaches any of the doctrines and practices specified in the preceding subparagraphs of this paragraph.

Further, a person who has been convicted in the Territory of a criminal offence punishable by imprisonment for one year or a person who, within five years of entry into Papua New Guinea, is or becomes an inmate of a mental hospital, may be deported.¹⁶

Where the Administrator-in-Council makes a deportation order, the person concerned must be notified, and may request that the matter be referred to a commissioner who is required to be a Supreme Court Judge (or a Barrister and Solicitor qualified to be a Supreme Court Judge) and who must make a full investigation and report.¹⁷

In his investigation the Commissioner is not bound by 'the forms of law' or the rules of evidence,¹⁸ of such a request for reference to a Commissioner is made, the deportation order cannot be carried out unless and until the Commissioner reports in relation to the person both that the ground specified in the notice has been established and that the person is not a fit and proper person to be allowed to remain in Papua New Guinea.¹⁹

The provisions of this Ordinance would appear to apply equally to Australian citizens and to aliens. In practice, Australian citizens have been deported.²⁰

Nor does citizenship confer the right to be issued with a passport for foreign travel: Australian passports are issued to Papuans (who are Australian citizens) and to New Guineans. Passports are issued by the Australian Government under the authority of the *Passports Act* 1938 as amended, Sec. 7 of which does permit the issue of passports to persons who are not Australian citizens. By Sec. 4, this Act applies to the Territories of the Commonwealth. The Act refers specifically to aboriginal natives of a country under the protection of [Her] Majesty. However, there is no compulsion in any case on the Minister to issue a passport. It again is a matter within the absolute discretion of the Minister.

Even if a Papuan or New Guinean did obtain a passport, he still might not be able to leave Papua New Guinea. Section 50 to 56A inclusive of the *Migration Ordinance* 1963-1969 deal with 'Protected Persons'. Although this legislation was passed in 1969, it had not come into operation by mid-February 1972. Therefore sections 50 to 56 inclusive of the previous legislation, which deal with "natives"²¹ remain in force. Under these provisions,

¹⁶ Ibid, S.12(1).

¹⁷ Ibid, S.12(4)-(9) incl.

¹⁸ Ibid, S.12(7) and (8).

¹⁹ Ibid, S.12(9).

²⁰ Personal Communication, Dept. of Law, Konedobu. February 1972.

²¹ "native" is defined in the *Ordinances Interpretation Ordinance* 1949 as amended, sec. 6 as "an aboriginal inhabitant of the Territory, and includes a person who follows adheres to or adopts the custom, or who lives after the manner of, the aboriginal inhabitants of the Territory". This would include certain persons who are citizens of Australia or other countries: under the legislation discussed below such persons might become virtually prisoners in an alien country.

it is an offence for a native to leave, or to attempt to leave Papua New Guinea without a permit or otherwise than as prescribed by the conditions of issue of such a permit.²² The Administrator is empowered to issue such a permit²³ but only when the applicant for a permit provides sureties (in the amount of \$200) or makes a deposit of \$200 to secure the performance of the conditions attaching to the permit.²⁴ There is apparently no limit to the type of condition which the Administrator is entitled to impose upon the issue of a permit and the granting or withholding of the permit is a matter which is solely within the discretion of the Administrator. The Administrator need not impose conditions upon the issue of permits, and in fact these permits are in normal circumstances issued freely and without conditions.

The Administrator has the power to revoke a permit issued pursuant to this Division of the Ordinance, and if he does so he is given power to order the return of the native to Papua New Guinea.²⁵ If such an order is made, the native may be held liable for the cost of repatriating him.²⁶ It is an offence for a native to refuse to comply with an order to return to Papua New Guinea²⁷ but it appears doubtful whether such an offence could be the subject of extradition proceedings, so that such an order might, in practice, be difficult to enforce.²⁸

1969 amendments to the Ordinance²⁹ do not make any significant changes to the substance of the legislation, except that the objectionable phrase 'native' is removed and replaced with the term 'protected person'.³⁰ A 'protected person' is one, or a member of a class in respect of whom a proclamation has been made by the Administrator. It was apparently the intention of the legislature to divide the population of Papua New Guinea into classes, some of which needed protection, others of which did not.

These provisions have their origins in the desire of the authorities to prevent 'blackbirding', i.e. the removal of Papuans and New Guineans to other countries in the Pacific area, where they were employed as plantation labour at ridiculous wages. Blackbirding has not taken place on any scale since the First World War, and the fact that provisions such as those just mentioned remain in the statute book seems an anachronistic exercise in paternalism, or alternatively, yet another plank in the White Australia Policy. It is quite clearly an unnecessary restriction on the freedom of movement of Papuans and New Guineans. The fact that similar provisions appear in the *Australian Migration Act*³¹ in respect of Australian Aborigines does not alter the position.

If a Papuan or New Guinean wishes to enter Australia, he must obtain an entry permit under the provisions of the *Australian Migration Act 1958* as amended, upon the wording of which the Papua New Guinea Ordinance

²² *Migration Ordinance* s. 51.

²³ *Ibid.*, Sec. 50(1).

²⁴ *Ibid.*, Sec. 50(3).

²⁵ *Ibid.*, Sec. 53.

²⁶ *Ibid.*, Sec. 55.

²⁷ *Ibid.*, Sec. 53(2).

²⁸ See generally as to extradition, P. Opas Q.C. at 42 *A.L.J.* 87. *The Service and Execution of Process Act* provisions might apply in Australia, but see *Re Conway* [1946] Q.W.N.31 as to offences which are not offences in the state where the offender is apprehended. The offence created by Sec. 53(2) would not be an 'extradition crime' within the meaning of the *Migration Ordinance Extradition Acts* (1966) (Cth.).

²⁹ New Sec. 50.

³⁰ *Migration (Permits) Ordinance*, 1969, Sec. 5.

³¹ *Commonwealth Migration Act*, Part III.

is based. This Act also does not refer to "Australian citizens" as those who may enter Australia without first obtaining an entry permit: its tests, like those contained in the Papua New Guinea Ordinance are also based on birth or residence.

Even though the law of both Australia and of Papua New Guinea would allow the authorities in both places to permit a person of any race born in either country to enter and reside in the other, whether he would be able to do so in practice rests upon an administrative decision by a government officer—i.e. the Administrator in the case of entry to Papua New Guinea, or the Minister for Immigration in the case of Australia. This administrative decision will be made in the light of current government policies and the information available to the official. There is no right for any person not born in Papua New Guinea to reside there, nor for any native to leave. The fact that many people do so is simply due to the fact that an administrative decision had been made.

If the type of citizenship which the Administrator's Executive Council proposes is adopted for Papua New Guinea³², it would seem that the present position with regard to entry to and residence in—(and possibly of exit from) Papua New Guinea would remain, not as a right of the citizen but a privilege conferred as the result of the making of an administrative decision.

The *Electoral Ordinance* 1963-1969 confers rights to vote³³ in, and to nominate for³⁴ elections to the House of Assembly. However, except in an indirect way, this Ordinance does not refer to citizenship. Those who are entitled to vote in elections are persons who are not aliens within the meaning of the *Citizenship Act* of the Commonwealth and who fulfil certain residence requirements. Sec. 5 of that Act defines an alien as a person who does not have the status of a British subject. As both Papuans and New Guineans have this status,³⁵ they are eligible to vote, and to nominate for election, but this is not really the result of citizenship or national status.

Other obligations, such as the obligation to pay income tax or local government tax, are also based on residence. The obligation of loyalty to the sovereign, discussed in *D.P.P. v Joyce*³⁶ would appear also to be independent of citizenship. The accused in that case was found guilty of treason, in England, notwithstanding in fact that he was a citizen of the Irish Republic. Some weight was attached to the fact that he held, or had held, a British passport, but as has been shown above, a state may issue a passport to a person who is not its citizen.

Future Possibilities

It has been suggested that a concept of citizenship in Papua New Guinea would be useful in fostering economic growth, e.g. by limiting grants of land, or licences to engage in certain types of business, to citizens. The thinking behind this suggestion is that non-indigenous persons should be obliged to elect whether to commit themselves to the future of Papua New Guinea or whether to maintain links with some other country. This has

³² See speech referred to in Footnote 1.

³³ *Electoral Ordinance*, S. 56A.

³⁴ *Electoral Ordinance*, S. 34.

³⁵ See p. 3 above.

³⁶ [1946] A.C. 347.

been done in some African countries³⁷ where 'Africanization' has become official policy. It would seem that the same results *might* be achieved without the concept of citizenship, by making use of the concepts of residence, or the definition of 'native' in the *Ordinances Interpretation Ordinance*. However, this might be offensive and open to accusations of racism. By basing discrimination in favour of citizens, some problems might be solved, and administrative machinery might run more smoothly. However, the problem of definition of citizenship, and the prescription of requirements of eligibility for citizenship must be political decisions, taken by the legislature of the country when it becomes self-governing, or, more probably, independent.

Conclusion

Citizenship may be a desirable concept in the building of national unity. However, unless and until the laws applying in Papua New Guinea dealing with rights of entry and residence, passports, elections, membership of the legislature etc. are changed, so that the qualifications required by those laws are expressed in terms of citizenship rather than some other qualification, such as residence, Papua New Guinea citizenship will not exist and the concept, without legislative definition based on political decisions, will have no meaning.

³⁷ Kenya *Trade Licensing Act*, No. 330 of 1967, Cap 497 Sec. 11.