



IN THE SUPREME COURT OF NAURU

[MISCELLANEOUS CAUSE]

Case No 72 of 2015

BETWEEN :Hon. ROLAND KUN MP

APPELLANT

And :SECRETARY FOR JUSTICE AND BORDER CONTROL

RESPONDENT

Before: Khan J

Counsel for the Appellant: Mr. V Clodumar

Counsel for the Respondent: Mr J Udit

Date of Hearing: 27 November 2015

Date of Ruling: 10 December 2015

**CATCHWORDS:** Cancellation of passport by Minister for Justice and Border Control – under Passport Act 2011- Appeal filed against Secretary of Justice- Republic Proceedings Act does not apply to the Passport Act- Secretary for Justice not the correct party – appeal should have been filed against the Minister.

Leave to join Minister as respondent after of expiry of 28 days appeal period- no provision under Passport Act to enlarge appeal period- inherent jurisdiction to enlarge appeal not applicable

**RULING**

1. Following the ruling of Madraiwiwi CJ dated 17 August 2015 the appellant filed a summons on 4 September 2015 seeking the following relief:

- (a) Leave be granted to the Plaintiff to amend the notice of appeal filed on 10 July 2015 pursuant to the ruling handed down by His Honour the Chief Justice on 17 August 2015.

## CHRONOLOGY OF EVENTS, APPLICATIONS AND RULINGS

2. Before I deal with the application I shall set out a chronology of events, applications and rulings made in this matter which as follows:
- a. On 16 June 2015 the appellant's passport was cancelled on directions of the Minister for Justice and Border Control (Minister);
  - b. On 18 June 2015 the Minister wrote a letter to the appellant confirming the cancellation of his passport;
  - c. On 18 June 2015 the appellant filed an application for leave to file Judicial Review through his pleader Mr. Vinci Clodumar. In the application the Secretary for Justice and the Minister were named as parties;
  - d. The leave application was heard by Registrar Mr. D Toganivalu on 18 June 2015. Mr. Clodumar sought leave to amend his application. The following amendments were sought:
    - i. Writ of certiorari bringing the decision of the Secretary for Justice and of the Minister for Justice into this Court to be quashed;
    - ii. Writ of Mandamus directing the Secretary for Justice or Minister to grant the application according to law;
    - iii. Any further or other relief the Court considers appropriate.
  - e. The Registrar granted leave for Judicial Review to be filed and ordered that the writ of summons to be served on the Secretary for Justice and Border Control as Respondent and listed the matter on the 22 June 2015;
  - f. On 23 June 2015 the appellant applied for a stay of the Minister's decision pursuant to section 41 (5) of the Passport Act 2011 (the "Act").
  - g. The matter was heard by Madraiwiwi CJ on 24 June 2015 and in his ruling he stated as follows:
    - i. *In view of the latest development the Judicial Review has been overtaken by events. To continue this proceeding while the remedies are now available to the applicant under the Passport Act has become alive would be an abuse of process.*

- ii. *Accordingly the Judicial Review proceedings are now vacated and the Court will proceed with the application under the Passport Act.*
  - iii. *The application to stay the Minister's decision under the Passport Act is adjourned to 26 June 2015.*
- h. The stay application was heard by Madraiwiwi CJ on 26 June 2015 and he made the following ruling at paragraph 4;
 

*"However the stay is attendant upon a notice and the grounds of appeal being filed under subsections (1), (2) and (3) respectively. That has not been done. Rather than proceed and determine the issue on a technicality, necessitating that this matter then proceed afresh at some time inconvenience to all parties, the Court will adjourn the proceedings to allow the Applicant to file a notice and grounds of appeal. The issue of stay can also be considered then."*
- i. On 26 June 2015 the appellant filed a notice of appeal against the respondent, the Secretary for Justice.
- j. On 27 June 2015 Madraiwiwi CJ delivered another ruling on a stay application in which he stated;
  - i. *"One applicant has the emotional distress of being separated from his family and the other applicant is hoping to be able to accompany the Nauru National Sporting Contingent to the Pacific games in Port Moresby. However the Court is also aware that there are important legal issues to be determined that require considered reflection."*
  - ii. *The matter was adjourned to 8 July 2015 for hearing.*
- k. On 10 July 2015 the applicant filed a proposed amended Notice of Appeal.
- l. The matter came before Madraiwiwi CJ on 13 July 2015 when orders were made for the respondent to file a response to the appellant's affidavit and to file written submissions by 17 July 2015. The matter was adjourned 20 July 2015 for hearing.
- m. On 20 July 2015 Mr. Clodumar informed the Court that the appellant was going to be represented by Ms. Georgina Coleman, a counsel from Australia, who was seeking admission, and was present in Nauru and the matter was adjourned to 21 July 2015 for hearing of her admission application.
- n. On 22 July 2015 the application for admission for Ms. Coleman was heard and the application was refused for non-compliance with the Legal Practitioners Act 1973.

- o. On 6 November 2015, Ms. Coleman's application for admission was approved by Madraiwiwi CJ subject to her being formally admitted upon her arrival in Nauru.
  - p. Madraiwiwi CJ delivered his ruling on 17 August 2015 and following that ruling an application to amend the notice of appeal to join the Minister as a respondent was filed on 4 of September 2015.
3. The application for amendment is opposed by the respondent. Both parties have filed extensive written submissions which have been of great assistance to the Court. The written submissions were filed by Ms. Coleman on behalf of the appellant.
  4. Before I consider the submissions of the parties I shall refer to the ruling of Madraiwiwi CJ dated 17 August 2015 in which he made findings in relation to the Republic Proceedings Act (RPA) and the Act. The Chief Justice's findings are as follows:
    - a. *That the RPA is of general application to the civil proceedings against the Republic;*
    - b. *Section 41 of the Act clearly provides that the appeal lies against the Minister and not the respondent;*
    - c. *That it would be totally wrong to apply the provisions of RPA to the Act because a statutory appeal under the Act is of different species from that contemplated by the RPA which are instituted by writ or originating summons;*
    - d. *That the respondent is the correct party in proceedings under the RPA, he is not the correct party under the Act and the appellant should have instituted this proceedings against the Minister rather than the respondent;*
    - e. *The respondent has advanced the case for the dismissal of the applicant's entire proceedings;*
    - f. *The appeal under the Act should be lodged within 28 days and if the entire proceedings were to be struck out the appellant would be left with no avenue for redress;*
    - g. *The proposed amended notice of appeal was struck out whilst the appeal remained on foot and the appellant is to make a proper application to amend the notice of appeal and join the Minister as the appropriate Respondent.*
  5. The respondent submits that subsequent to the filing of the original notice of appeal on 26 June 2105 an amended notice of appeal was filed on the 10 of July 2015, and thus the original notice of appeal merged with the amended notice of appeal.

6. The respondent further submitted that when Madraiwiwi CJ ordered the amended notice of appeal to be struck out, there was no appeal left and therefore an application cannot now be made to join the Minister as a respondent.
7. The respondent's submission appears to be flawed because the Chief Justice only struck out the proposed amended notice of appeal. The appellant never made an application for leave to file the proposed amended notice of appeal, and therefore it remained as a proposed amended notice of appeal, and with it being struck out the original notice of appeal survived and remained on foot as stipulated by the Chief Justice in his ruling.
8. The respondent further submitted that if an order is now made to join the Minister as respondent, that would infringe the appeal period as set out in Section 39 of the Act, which is 28 days, and that there is no provision under the Act to grant an extension of the 28 day period.

#### APPELLANT'S SUBMISSIONS

9. The appellant concedes that the Civil Procedure Rules does not apply to the Act.
10. The appellant's submission is that the Minister's decision can be reviewed under the supervisory jurisdiction of the Court. In making that submission the Counsel relied on the case of **Qin v Minister for Immigration and Multicultural Affairs (1997) 77 FCR** and **Hong v Minister for Immigration and Multicultural Affairs (1998) 82 FCR 468** which is under the Migration Act 1958 (Cth).

#### RESPONDENT'S RESPONSE

11. Mr. Jay Udit in reply submitted that case of Qin and Hong are under the Migration Act 1958 (Cth) under which the Courts were given powers to extend the time for appeal, and that the Act did not make any provisions for the extension of time.

#### WHAT WOULD BE THE EFFECT OF JOINING THE MINISTER AS A PARTY?

12. I accept that the original appeal is on foot, then the question I have to ask is whether the appeal was correctly filed. In his ruling at paragraph 22 the Chief Justice stated:

*"While the respondent is the appropriate party in proceedings under the RPA, he is not the correct party for these proceedings under the Act".*

If the respondent was not the correct party then in my view there is no proper appeal before the Court, and if I were to make an order to join the Minister as a party its effect would be that a fresh appeal would be filed from the date of the order, which will be beyond the 28 day appeal period.

**DO I HAVE POWERS UNDER THE INHERENT JURISDICTION TO EXTEND THE 28 DAY APPEAL PERIOD?**

13. The Act is very similar to the Nauru Lands Committee Act 1956 (NLC 1956) where at paragraph 7(1) it is stated:

*"A person who is dissatisfied with a decision of the Committee may, within 21 days after the decision is given, appeal to the Supreme Court against the decision.*

14. Section 39 (d) of the Act states:

*"If the decision was made by the Minister-that person may appeal to the Supreme against the decision within 28 days after receiving the notice.*

15. So it can be seen that section 7(1) of NLC1956 and section 39 (d) of the Act are similar, if not identical.

16. Now let me consider the following cases in which application for leave to file appeal out of time was made:

a) In the case of Ceila Cecila Giouba v Nauru Land Committee & Others NRSC 11 Eames CJ stated :

*" In Lydiana Adun and Others v Beneficiaries of Estate of Eigaga Heirich and Nauru Land Committee, Millhouse CJ, also held that the inherent powers of the Court did not extend to permitting an appeal out of time under s.7(1), where the legislature did not empower the Court to so act."*

b) In Kepae v Dabwadauw [2011] NRSC 15Eames CJ. stated :

*"I delivered judgment in Giouba v Nauru Land Committee [2] on 15 March 2011 wherein I dismissed a land appeal on the basis that there was no right to apply for an extension for an appeal under section 7 of the Nauru Lands Committee Act 1956. The same conclusion was reached by Millhouse, C.J.in his ruling in this case on 22 May 2010, but delayed making a final order dismissing the appeal, permitting Mr. Kun to be heard if he sought to be. Mr. Kun had not been able to attend court due to illness. It is clear, however, from his judgment that Millhouse, C.J. held there to have no right of appeal."*

c) In Kepae V Nauru Lands Committee[2011] NRSC 3 C. J. Eames stated:

*"Even allowing that I have such power, and assuming I exercised it in favour of the appellants, that would only bring Mr. Kun to the position where he has got the right to seek to overturn the decision of Millhouse C. J. so as to seek leave to appeal out of time. However, the Court would be unable to accede to any such application. It would be a futile exercise, having regard to the interpretation of s.7(1) that was adopted by Millhouse CJ, which I*

*endorse, and which, as I discuss in Giouba v Nauru Lands Commission [2011] NRSC 1., has been expressed by many judges of this Court. There is no right of appeal outside the 21 days."*

## REPUBLIC AS MODEL LITIGANT

17. The appellant has submitted that the respondent as the Republic should be a model litigant and, should not be raising technical issues like appeal being out of time to defeat the appellant's application. Even if the Republic were to concede that it has no objections to an appeal being out of time, and notwithstanding that concession (which is not the case) I would still be powerless to enlarge the time, as that power can only be conferred on the court by the legislature. I repeat the comments of Millhouse C.J. in *Giouba v Nauru Land Committee* where he stated:

*"In Lydiana Adun and Others V Beneficiaries of Estate of Eigaga and Nauru Land Committee, Millhouse CJ. Also held the inherent powers of the Court did not extend to permitting an appeal out of time under s.7 (1), where the legislature did not empower the Court to so act.*

I also refer to the case of *Kepae V Dongobir [2010]* in which Millhouse C.J. stated:

*"Any concession by the Lands Committee is irrelevant"*

## DISCRETION

18. The appellant's counsel has submitted that I ought to exercise the discretion in his favour. Unfortunately I do not have any jurisdiction to exercise the discretion in his favour as I have not been vested with that power under the Act.

19. Section 7 (1) in NLC 1956 was amended by the Nauru Lands Committee (Amendment) Act 2012. The amended section 7 (1) reads as follows:

(1) Any person who is dissatisfied with a decision of the Committee may appeal to the Supreme Court against that decision:

- a. within 21 days after the decision is published; or
- b. with leave of the Court.

20. The case of *Capelle v Nauru Land Committee [2013] NRSC 4* shows how the discretion can be exercised when the Court is conferred with appropriate power. Eames CJ stated as follows:

*"[8] The applicant now applies for leave of appeal out of time with respect to the determination as to the personality estate. Another new s.7 (1)(b) also came into effect on 10<sup>th</sup> of October 2012, That provided that the Court may grant leave to appeal out of time. The discretion of the Court is not restricted in any way by the terms of section.*

*[9] An application for leave to appeal out of time should not be judged by any strict formula or rigid formula. The relevant principles are described in Halsbury' Laws of Australia:*

*"The discretion is unfettered and should be exercised flexibly with regard to the facts of the case. The court will not decide the application according to a formula created by erecting what are merely relevant factors into the arbitrary principles so as to allow the automatic production of a solution. However, since the discretion to extend time is given for the purposes of enabling the court to avoid injustice, the court must determine whether justice as between the parties is best served by granting or refusing the extension sought. A consideration relevant to the exercise of the discretion is that upon expiry of the time allowed for appeal the respondent has a vested right to retain the judgement unless the application is granted. Other relevant matters include the length of the delay in commencing the appeal, the reasons for the delay, the chances of the appeal succeeding if an extension of time is granted, the degree of prejudice to the respondent if time is extended and the blamelessness of the applicant. Leave to appeal out of time may be given subject to specified terms. The interests of justice and a hearing upon merits are the basal considerations."*

19. In the circumstances the appellant's application to join the Minister as a party under the Act is refused as it is out of time.

Dated this 10th day of December 2015



Mohammed Shafiullah Khan

JUDGE

