NATIONALITY

IN THE COURT OF APPEAL OF TONGA
REGISTRAR GENERAL JURISDICTION
NUKU'ALOFA REGISTRY

APPEAL NO. AC 19 of 2011
[RG 259 of 2011]

BETWEEN	:	**THE CROWN**	-	**Appellant**
AND	:	**PAUL DAVID SCHAUMKEL**	-	**Respondent**

Coram : **Burchett J**
Salmon J
Moore J

Counsel : ***Mr. Kefu*** **for the Appellant**
Mr. Fa'otusia **for the Respondent**

Date of hearing : **16 April 2012**

Date of judgment : 9 July 2012

JUDGMENT OF THE COURT

1. This is an application to review a ruling of the Lord Chief Justice, sitting as the Registrar General, in proceedings commenced as an application for an order approving the registration of birth of a legitimate child which occurred outside the Kingdom of Tonga. Provision for registration is made by Regulation 7 of the Registrar General's Births

and Deaths Regulations 1979. It is essential to the success of an application for the registration of an overseas birth that the person to be registered be found to be in law a Tongan.

2. The ruling concerns a claim to Tongan citizenship made on the basis of s.2 of the Nationality Act [Cap.59] as amended by the Nationality (Amendment) Act 2007, which received the royal assent on 14 August 2007. Relevantly, this section provides:

> *"2. The following persons shall be deemed to be Tongan subjects –*
>
> ...
>
> *(b) any person born abroad of a Tongan father ..."*

3. The circumstances in relation to which this provision comes to be considered may be stated briefly. The Respondent is the father of a legitimate male child (Peter Denzel Paul Schaumkel, the child) born outside the Kingdom of Tonga on 23 December 2002 in Auckland, New Zealand, that is to say, nearly five years before s.2 of the Nationality Act was amended to its present form. The Respondent, who was born on 19 December 1958, was a Tongan also born in New Zealand, but he was unquestionably born a Tongan subject because at that date s.2(a) of the Nationality Act provided the first generation born abroad of Tongan parentage, were Tongan nationals. The terms of the section are set out shortly. Thus the male child was a person born abroad of a Tongan father, to use the language of s 2(a) in its present form.

5. In his very careful submissions, Mr Kefu, for the Crown, emphasised that the construction of the 2007 amendments, and the amendments to s.2 in particular, adopted by the Lord Chief Justice involved their retrospective operation. He pointed to the established principle that there was a presumption against the retrospective operation of legislation. He made a number of subsidiary and related submissions which we discuss later.

6. Before dealing with this central submission concerning the presumption against retrospectivity, it is convenient to describe in a little more detail the effects of the 2007 amendments. It is apparent from the text of the amendments they were directed to achieving two principal objectives. The first was to broaden significantly the class of individuals who would become Tongan nationals having regard to, amongst other things, the status of the individual's parents at the time of the individual's birth. The second was to enable Tongan nationals to become nationals of another country without forfeiting their Tongan nationality. In effect, the 2007 amendments recognised and accepted, for the first time in Tongan legislation, the notion of dual nationality.

7. The broadening, in 2007, of the class of individuals who would become Tongan nationals should be seen in its historical context. Before 1935, Tongan nationality was determined by applying the common law. Thereafter it was addressed legislatively. This was achieved in 1935 by an amendment to the Nationality Act inserting a new s.2 as follows:

> *The following persons shall be deemed to be Tongan subjects –*
>
> *(a) any person born in Tonga of Tongan parentage and the first generation born abroad:*
> *Provided however that the child of an illegitimate union born abroad shall only be deemed to be a Tongan subject where the parents of such child are Tongan subjects and the father acknowledges the paternity of the child or in the event of dispute where the paternity is established by process of Law;*
>
> *(b) any person naturalised under this Act;*
>
> *(c) any person born out of wedlock in Tonga whose father is a Tongan subject and whose mother is an alien; and*
>
> *(d) any person born out of wedlock in Tonga whose mother is a Tongan subject and whose father is an alien.*

8. In 1959, s.2 of the Nationality Act was amended a second time by the Nationality (Amendment) Act 1959, and a third version of s.2 was as follows:

The following persons shall be deemed to be Tongan subjects –

(a) any person born in Tonga whose father is a Tongan;

(b) any person born abroad of a Tongan father who was born in Tonga;

(c) any person born out of wedlock in Tonga whose mother is a Tongan;

(d) any alien woman who marries a Tongan provided that within 12 months from the date of her marriage she-

(i) lodges with the Minister of Police a written declaration that she wishes to assume Tongan nationality; and

(ii) takes the oath of allegiance prescribed by this Act;

(e) any person naturalised under this Act.

9. In 2000, there was a minor amendment made by the Nationality (Amendment) Act 2002 changing the authority from the Minister of Police to the Minister of Foreign Affairs.

10. In 2007, s.2 was amended for the fourth time and resulted in the current version as follows:

The following persons shall be deemed to be Tongan subjects –

(a) any person born in Tonga to a Tongan parent;

(b) any person born abroad of a Tongan father;

(c) any person born abroad of a Tongan mother;

(d) any non-Tongan who marries a Tongan provided that he –

(i) lodges a written declaration with the Minister of Foreign Affairs that he wishes to assume Tongan nationality; and

(ii) takes the oath of allegiance prescribed by this Act; and

(e) any person naturalized under this Act."

11. Comparing the 1959 version and the 2007 version of s.2 of the Nationality Act it can be seen that in relation to each of the paragraphs there is an expansion (on the regime operating between 1959 and 2007) of the class of people entitled to nationality.

12. Looking at the 1959 version, s.2(a) concerned a person born in Tonga whose father is a Tongan. The 2007 amendment was plainly intended to confer Tongan nationality on any person born in Tonga whose mother (picked up by the word "parent") was Tongan, a class excluded by the 1959 legislation.

13. As to s.2(b), the 1959 legislation concerned the son or daughter born abroad, of a Tongan father born in Tonga. The 2007 amendment was intended to remove the qualification that the father had to have been born in Tonga. So a class excluded by the 1959 legislation, namely a person born abroad who had a Tongan father who had not been born in Tonga, was included by the 2007 amendments.

14. As to s.2(c), the 1959 legislation picked up a person born out of wedlock in Tonga when the mother was Tongan. In effect, this class was expanded significantly by the 2007 amendments (relating as this class does in the 2007 amendments, to the Tongan nationality of the mother) abandoning any limiting criterion referable to birth in Tonga as well as birth outside the marriage.

15. As to s 2(d), the 1959 legislation only applied to women marrying a Tongan whereas the 2007 amendments applies to both men and women marrying a Tongan.

16. In relation to dual nationality, since at least 1935, the Nationality Act declared that a person who voluntarily became a naturalised citizen of another country ceased to be a Tongan national. The 2007 amendments allowed for dual citizenship. The 2007 amendments also contained a provision (which became s.17) allowing a person who had lost Tongan nationality to apply for "re-admission to Tongan nationality" though this was subject to a power vested in the Minister for Foreign Affairs to grant or withhold "a certificate of re-admission".

17. We now deal with the argument central to Mr Kefu's submissions, namely that the amendment to s 2.(b) as construed by the Lord Chief Justice had retrospective operation. The first point to be made is that even on the construction adopted by his Lordship, the amendment will only take effect from the date on which it was passed and thus a person affected by it will only become a Tongan subject from that date, Although Mr Kefu seems to accept this, he nevertheless expresses concern about the retrospective effect of the amendment. In our opinion, the better view is that the amendment will have have no retrospective effect. It has long been accepted that the presumption against retrospective legislation does not necessarily apply to an enactment merely because, *"a part of the requisites for its action is drawn from time antecedent to its passing"* (see *R v Inhabitants of St Mary, Whitechapel* (1848) 12 KB 120 at 127).

18. There are a number of illustrations of this principle. One of the best known is that cited in the judgment of the Lord Chief Justice re *A Solicitor's Clerk* [1957] All ER 617. One statement of the common law position was by the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 at 558 where Lord Brightman delivering the advice of the Judicial Committee said:

> *"A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already passed."*

By that formulation the Nationality Act as amended in 2007 is not retrospective. However we accept that there is no universally accepted bright line enabling a ready classification of legislation as retrospective or not retrospective. This is illustrated by recent discussion by French CJ, Crennan and Kiefel JJ of the High Court of Australia in *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19 who said (at [26]):

> *The common law principles of interpretation require careful consideration of the adjective "retrospective" in its application to statutes.* [At this point the Justices footnote a book that

addresses definitional difficulties – Sampford, Retrospectively and the Rule of Law, (2006) at 17-23]. *Interference with existing rights does not make a statute retrospective. Many if not most statutes affect existing rights. As Fullagar J said in* Maxwell v Murphy:

"I think that the word 'retrospective' has acquired an extended meaning in this connexion. It is not synonymous with *'ex post facto'*, but is used to describe the operation of any statute which affects the legal character, or the legal consequences, of events which happened before it became law."

In Chang Jeeng v Nuffield (Australia) Pty Ltd *Dixon CJ referred to "the rules of interpretation affecting what is so misleadingly called the retrospective operation of statutes." Repeating a passage from his judgment in* Maxwell v Murphy, *the Chief Justice said*:

"The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

There have been many formulations of the common law principle in the decisions of this Court and of other common law courts to which this Court has referred from time to time. It is not necessary to travel beyond the general statement by Dixon CJ, save to consider its application in relation to legislation said to affect prior judicial decisions. In the end, the Court must construe statutes by reference to their text, context and purpose.

19. For the purposes of argument we are prepared to proceed on the basis that arguably the 2007 amendments might be characterised as, at least potentially, retrospective in their operation. Accordingly it is necessary to consider the principles which apply in determining whether the legislation is to be given, as a matter of construction, that retrospective operation.

20. The modern approach to the question whether legislation should be construed in the light of an apparent effect of retrospectivity is clearly stated by Lord Mustill in a passage of his speech in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, the*

Boucraa [1994] 1 All ER 20, 29-30 which is set out in *Craies on Legislation* 9 ed. (2008) at 925:

> *"My Lords, it would be impossible now to doubt that the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect. Nor indeed would I wish to cast any doubt on the validity of this approach for it ensures that the courts are constantly on the alert for the kind of unfairness which is found in, for example, the characterisation as criminal of past conduct which was lawful when it took place, or in alterations to the antecedent natural, civil or familial status of individuals. Nevertheless, I must own to reservations about the reliability of generalised presumptions and maxims when engaged in the task of finding out what Parliament intended by a particular form of words, for they too readily confine the court to a perspective which treats all statutes, and all situations to which they apply, as if they were the same. This is misleading, for the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule. True it is that to change the legal character of a person's acts or omissions after an event will very often be unfair; and since it is rightly taken for granted that Parliament will rarely wish to act in a way which seems unfair it is sensible to look very hard at a statute which appears to have this effect, to make sure that this is what Parliament really intended. This is, however, no more than common sense, the application of which may be impeded rather than helped by recourse to formulae which do not adapt themselves to individual circumstances, and which tend themselves to become the subject of minute analysis, whereas what ought to be analysed is the statute itself."*

21. Similarly, in *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413 at 434 Isaacs J said, discussing the disinclination of courts to give retrospective effect to Acts:

> *"But its application is not sure unless the whole circumstances are considered, that is to say, the whole of the circumstances which the Legislature may be assumed to have had before it. What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side.*

22. The three Justices of the High Court in *Australian Education Union v General Manager of Fair Work Australia* mentioned earlier (French CJ,

Crennan and Kiefel JJ) also referred to the judgments of Lord Mustill and Isaacs J and then said:

> *Consistently with its underlying rationale, the resistance of the common law to construing statutes as taking effect before the dates of their enactment is graduated according to the extent of their propounded effects. In* R S Howard & Sons Ltd v Brunton, *Griffith CJ said:*
>
> "it is a settled rule of construction of Statutes that a law is not to be construed as retrospective in its operation unless the Legislature has clearly expressed that intention, and a further rule that it is not to be construed as retrospective to any greater extent than the clearly expressed intention of the Legislature indicates."
>
> *That graduated response was also reflected in the quotation by Lord Mustill in* L'Office Cherifien *from the judgment of Staughton LJ in* Secretary of State for Social Security v Tunnicliffe*:*
>
> "It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."
>
> *In* Attorney-General (NSW) v World Best Holdings Ltd *Spigelman CJ referred to the judgments of Staughton LJ and Lord Mustill and said:*
>
> "This approach requires the court to determine the scope and degree of the unfairness or injustice that is applicable in the particular case. The greater the unfairness or injustice, the less likely it is that Parliament intended the Act to apply. Where Parliament has used general words the courts will apply the well established technique of reading them down."
>
> *While "fairness" and "justice" denote values underlying the relevant common law principles, it is neither necessary nor desirable, as a general rule, that the task of construction be mediated by broad evaluative judgments invoking that terminology. They carry the risk that the courts may then exceed their proper constitutional function. It is sufficient to focus upon the constructional choices which are open on the statute according to established rules of interpretation and to identify those which will mitigate or minimise the effects of the statute, from a date prior to its enactment, upon pre-existing rights and obligations.*

23. Ultimately, of course, our task is to construe the Nationality Act as amended by the 2007 amendments. In so far as the 2007 amendments may confer nationality on a class of individuals born before 2007 who hitherto had not been Tongan nationals, it is in substance beneficial or remedial legislation. The same can be said about the conferring of nationality on individuals of this wider class born after 2007, about whom there is no doubt that the Act, as amended, applies. One way of approaching the construction of such beneficial or remedial legislation when issues of retrospectively might arise, is described in the following passage of the judgment of Dawson J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501. We agree with his Honour's observations which were:

> *But Blackstone was not denying the capacity of Parliament to pass* ex post facto *laws, however undesirable they may be: see* Commentaries, *16th ed. (1825), vol.I, p 90. The resistance of the law to retrospectivity in legislation is to be found in the rule that, save where the legislature makes its intention clear, a statute ought not be given a retrospective operation where to do so would be to attach new legal consequences to facts or events which occurred before its commencement:* Fisher v. Hebburn Ltd. *per Fullagar J. at p 194; see also* Maxwell v. Murphy *at p 267;* Geraldton Building Co. Pty. Ltd. v. May*;* Rodway v. The Queen, *at p 518. However, the injustice which might be inflicted by construing an enactment so as to give it a retrospective operation may vary according to its subject matter. Indeed, justice may lie almost wholly upon the side of giving remedial legislation a retrospective operation where that is possible: see* George Hudson Ltd. v. Australian Timber Workers' Union, *at p 434. With legislation of that character, if the ordinary rule be couched in terms of a presumption against retrospectivity, it must, at best, be a weak presumption: see* Doro v. Victorian Railways Commissioners, *at pp 85-86. With a criminal law, where the injustice of giving it an* ex post facto *operation will ordinarily be readily apparent, the presumption must be at its strongest.*

24. We agree that in relation to legislation of the type presently under consideration, the presumption against retrospectively is, at best, a weak presumption.

25. One particular contextual matter relied upon by Mr Kefu needs to be considered. He points to the fact that the 2007 amendments introduced a process whereby an individual who had been a Tongan national but had lost that nationality by becoming a national of another country, could apply to become, again, a Tongan national notwithstanding that individual remained a national of another country. As we understood Mr Kefu's argument this aspect of the 2007 amendments (together with later regulations concerning the same issue of dual nationality) pointed to the amendments made in 2007 to s.2 (expanding the class of people who would be Tongan nationals) operating only on individuals born after the 2007 amendments came into force. That would be because the special provisions enabling an individual to apply for Tongan nationality when the individual had earlier lost, by acquiring another nationally, Tongan nationality, would be unnecessary. They would be unnecessary because Tongan nationality would be acquired automatically by the retrospective operation of s.2 as amended in 2007 (if the section operated retrospectively). This apparent absurdity, as Mr Kefu appears to have argued, would not arise if s.2 had no retrospective operation.

26. However the answer to this argument is, in our opinion, that the provisions concerning Tongan nationals having to apply for nationality if they had earlier lost it in the way we are presently discussing, are special provisions intended to operate to the exclusion of the general provisions in s.2. That is, s.2 has no automatic application to individuals who have to apply for Tongan nationality because they had earlier lost it by becoming nationals of another country. This is understandable because the special provisions concern individuals who had taken a positive step which resulted, under the law at the time, in the loss of Tongan nationality. It is understandable that such individuals be required to actually apply for Tongan nationality and to have that application considered and, if appropriate, approved.

27. We now address some other matters raised by Mr Kefu. He expressed concern that if the amendments were to apply to persons born prior to 2007, they would have nationality imposed upon them which they might not want for personal reasons or for reasons of loss or benefit from their current nationality. Such a disability, if it existed, could be overcome by a formal rejection of the Tongan nationality.

28. Mr Kefu then submitted that the effect of the interpretation proposed by the Lord Chief Justice is that a new birth certificate will be issued to state that the individual was born a Tongan since the date of his birth. We are not aware of any legislative provision that would have that effect. There is, of course, the provision that is contained in Regulation 7 of the Registrar General's Births and Deaths Regulations 1979 but that refers to registration in a special register. It cannot affect the country of birth. That must remain as it has always been.

29. The question then becomes one of conventional statutory interpretation. Should the word "born" be interpreted to mean born either prior to or after the commencement of the amendment, or only after the commencement. In our view, the ordinary meaning of the word, supported by dictionary definitions, is that it refers to a birth whenever it occurred. For example the Shorter Oxford English Dictionary defines the word as "to be brought forth as offspring" But as Cooke P said in *McKenzie v Attorney General* [1992] 2 NZLR 14 at 17,

> *"... in the end the issue, like most issues of statutory interpretation, is the natural and ordinary meaning of the words of the Act read in their context and in the light of the purpose of the Act"*

And later:

> *"... strict grammatical meaning must yield to sufficiently obvious purpose."*

30. We have carefully considered the provisions of the amendment, its place in the Act and the history of the legislation, but can find no

justification for departing from the ordinary meaning of the word. The clear purpose of the Act is to enlarge the class of those identified as Tongan subjects. Of course the restrictive interpretation referred to above would do that, the ordinary interpretation more so. We are aware of no rule of construction that would require that the word have a restricted meaning. If Parliament had intended that the word apply only to births occurring after the amendment it could have used words such as "born after the enactment of this amendment".

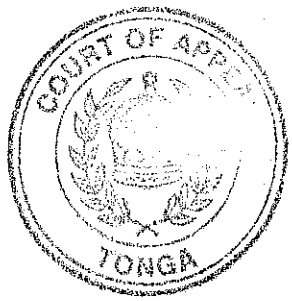
31. The Crown's construction of the amendment would read it as subject to an unexpressed qualification that it applies only to persons born after the amended Act came into force. But the language can be given a plain effect as relating to persons then living or thereafter born. In our opinion it should be so read. So to read it is not to affect any settled right, in a brother or other person, such as an inheritance right, which had already accrued before the Act (as amended) commenced – at a time when a child, born in the same circumstances as the subject child, was outside the scope of the Nationality Act.

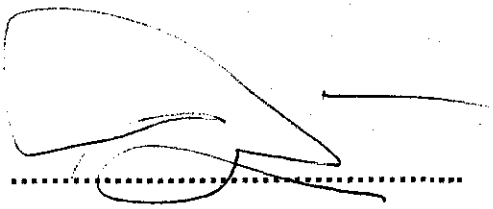
32. It was suggested in argument that this Court had held in *Edwards v Kingdom of Tonga* [1994] Tonga LR 62, as a general proposition of law, that the question of citizenship was determined at the date of a person's birth. But so to understand the decision is to ignore its context. Mr Edwards was born before the enactment of the Nationality Act's provisions governing the acquisition of citizenship were adopted. At his birth, his status as a subject to the Kingdom was established by the principles of the common law, which gave him, the rights of a citizen.

33. It was also suggested that the rights of inheritance of land of brothers of a child born abroad in circumstances such as those in this case would be affected if the amended s.2 applied to an existing family. But inheritance and nationality are different issues. And in any case, the eventual accrual of an inheritance may be affected in many ways. The

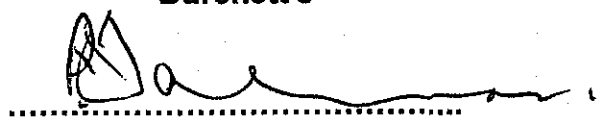
argument really treats a mere potentiality (of its nature capable of being defeated) as if it were an actual right. Nor is any unfairness apparent in the application of s.2 to an existing family. It may rather be thought it would be unfair to perpetuate the exclusion of one brother because he happened to have been born abroad.

34. The ruling of the Registrar General upholding the status as a subject of the Kingdom of Tonga of Peter Denzel Paul Schaumkel should be affirmed with costs.

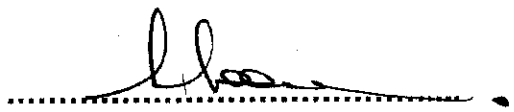




Burchett J



Salmon J



Moore J