IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY C214/99

BETWEEN : HON. WILLIAM C. EDWARDS : *Plaintiff*

AND : 1. SIAOSI FIFITA
2. KELEPI MAKAKAUFAKI
3. 'UHILA LIAVA'A : *Defendants*

BEFORE THE HON JUSTICE FINNIGAN

COUNSEL: Mr J Cauchi for Plaintiff, Ms T Tapueluelu for Defendants

DATE OF HEARING: 8 April 1999
DATE OF JUDGMENT: 24 May 1999

JUDGMENT OF FINNIGAN, J

THE FACTS

The Defendants are constituted as a Court of Inquiry pursuant to Ss 15 & 16 of the Prisons Act cap 36("the Act"), in order to inquire into certain charges that have been brought against the Superintendent of Prisons. They commenced hearing the first charge on 8 February 1999 and heard 3 prosecution witnesses. After that, they directed counsel for the parties to make submissions about whether it had jurisdiction to hear the charges. They identified that question as a legal issue. After hearing submissions they adjourned the hearing and on 15 February 1999 delivered a written decision. In that decision they held that they did not have jurisdiction to inquire into the charges against the Superintendent because he is not a "prison officer" within the meaning of that term in s 2 of the Act.

The plaintiff seeks orders reviewing and setting aside the decision of the Court of Inquiry, together with a declaration that the Superintendent of Prisons is a "prison officer" within the meaning of that term in the Prisons Act cap 36. A further order is sought directing the Court of Inquiry concerned to continue the hearing, which has been commenced but has been terminated by the decision that is under review.

THE DECISION UNDER REVIEW

The Court of Inquiry's decision and a translation of it are before the Court. It records that the Court of Inquiry had expected the defence to raise the issue of its jurisdiction, but had not. The issue as seen by the Court of Inquiry arose out of perceived inconsistencies between s 2 and s 6 of the Act, by reference to the current Act and by reference to its previous (1967) form. S 2 is the definition section of the Act (which defines a prison officer) and s 6 is the section creating the posts that prison officers may hold. After calling for and considering the arguments, the Court of Inquiry held that the amendment of s 6 from its previous form by Act

No 13 of 1987 introduced an inconsistency with s 2, which had never been remedied. All it takes, they held, is a correction of s 2 so that it describes the new posts that are now set out in s 6. To remedy the defect they held was not their function. They referred to inconsistencies that they found between the Tongan and the English versions of s 6. They held that the Interpretation Act cap 1 cannot apply to remedy the lawmakers' inadvertence, and that to apply it is to impair justice.

They consequently held that the powers of Ss 15 & 16 of the Act did not give them authority to proceed with the hearing because the Superintendent of Prisons is not a "prison officer" until s 2 of cap 36 is amended to be consistent with s 6.

PLEADINGS

Both parties filed pleadings, but I take these as indications of positions only, and decide the issue by reference to the submissions.

THE SUBMISSIONS

These were of a high order, from both counsel. They are the foundation of my decision, but for brevity I shall not refer to them in detail.

THE STATUTORY PROVISIONS

It is common ground that the Court of Inquiry was set up under Ss 15 & 16 of the Act. It is not necessary to set out those provisions. Under s 15, the Court of Inquiry has been constituted a judicial body in the nature of a court. Its function is to inquire into the charges that have been laid against the Superintendent of Prisons, and the president of the court has all the power of a magistrate in regard to summoning and enforcing the attendance and responses of witnesses. Under s 16, the court's power is to hear and determine the charges, and to impose punishment.

S 6 of the Act is as follows:

> 6. The establishment of the prisons shall consist of the Superintendent of Prisons, Assistant Superintendents of Prisons, Chief Warders and such number of officers as may from time to time be provided for in the Annual Estimates of the Kingdom.

S 2 of the Act is (in part) as follows:

> 2. In this Act – (etc) – "prison officer" means a Chief Gaoler or any subordinate officer employed in any prison.

At s 14 the Act prescribes the responsibilities of the Chief Gaoler of each district. It does not say what it means by districts, but in s 4 it prescribes the places in various parts of the country which are to be prisons. Under s 14 the Chief Gaoler of each district has four defined responsibilities. He is responsible for the safe custody of prisoners committed to the prison of which he has control, for the carrying out of the sentences passed upon the prisoners committed to his custody, for the discipline of all prison officers and prisoners under his charge, and for the safety and the proper care of all instruments tools and other implements connected with the prison of which he has control.

The Act does not refer otherwise to the Superintendent of Prisons or to the Chief Gaoler. It does contain several references to the duties and rights of "every prison officer".

DECISION

The power to interpret its own jurisdiction is not given to every judicial tribunal. The powers of any tribunal must be carefully scrutinised to see if that is included. In the present case the Court of Inquiry was a creature of Ss 15 &16 of the Act. Its powers, i.e. what it may legally achieve as its own work, are set out there. It cannot embark on other work, if it does then it will be outside its powers and doing nothing effective. It has the powers of a magistrate in respect of witnesses, and that is a power at law, to be used if certain facts are proved. It has the power "to hear and determine all charges of (a) intoxication, or (b) serious breaches of good order or discipline or of any prison rule, which may be brought against any prison officer" (s 16). That is largely a matter of fact, but decisions of law may also be needed, e.g. the interpretation of a prison rule.

However there is no power given to this tribunal "to determine....for the purposes of any given case the meaning of provisions in the Act by which it [was] constituted and under which it operates". Those words are taken from *Engineers' Union v Arbitration Court* [1976] 2 NZLR 283 at 301, to which Mr Cauchi referred me.

It does however in my view, include a power (and a duty) to be satisfied that any particular person charged before it is a "prison officer" as defined in the Act. This is a decision of law and fact. The law is the interpretation of the definition of a "prison officer" in s 2, and the fact is the assessment of the evidence about the person charged in order to determine whether the person is within that definition.

This is highlighted in the present case. Each of the charges laid alleges directly that the Superintendent of Prisons did a certain things "as a prison officer". That ingredient is common to all of the charges, and must be proved in each of the charges. Since the Court of Inquiry had doubts about this single common ingredient at the outset, it took what I think is a sensible step in seeking to have its doubt resolved early. But in my opinion it fell into error in treating the question as a question of pure law that went to its jurisdiction. The question is one that arose naturally in the course of its deliberations. It is a question of fact and law, to be decided not only on the interpretation of s 2 of the Act, but also on the evidence about the actions of the Superintendent.

I turn to the question of law, the interpretation of s 2.

A prime principle of statutory interpretation is a presumption that the legislature intended to pass legislation that would work. The whole statute must be considered for this purpose, not just the words being interpreted. The history of the legislation is relevant. In the present case, it seems the legislature amended s 6, which creates the establishment of the prisons, without making consequential amendments to Ss 2 & 14. The office of Chief Gaoler is the highest rank of prison officer under s 2, but it no longer exists among the positions in the prison service that are named in s 6. Nonetheless, the person holding the position that originally had that title still has the same duties to perform under s 14.

The Court of Inquiry took the view that in order to read s 6 properly one must bear in mind not only what it says but what it used to say before it was amended. That is a valid principle of statutory construction, in its place. The law abounds with examples of resort to the historical setting of legislation in order to determine the intention of the legislature. The essence of the application of this principle however, is that it is used to determine what the legislature intended, not what it may inadvertently have omitted to do.

Allied with that is the presumption against absurdity that I have mentioned. Under these two principles one must first ask, what was intended at the time of passing the amending Act of 1987? The change to s 6 was the main effect of that Act. The previous s 6 was as follows:

> *6. The establishment of the prisons shall consist of such number of Chief Gaolers and subordinate officers as may from time to time be provided for in the Annual Estimates of the Kingdom.*

The amendment to s 6 changed and added to the positions and titles of the officers who make up the prison establishment. That was what was intended by the legislature. The other amendments made by the amending Act were minor matters, deleting the word "male" from s 12 and updating penalties. The title or description Chief Gaoler remained unaltered in s 2, and s 14(above) sets out the responsibilities of the Chief Gaoler. To interpret the statute as the Court of Inquiry did is to make it an absurdity, with nobody to perform those vital functions, whereas it is highly probable that some prison officer must have continued performing those functions after the amendment, and the statute could easily be read in a way that makes it work, despite the bad drafting.

Pursuant to s 11(2) of the Laws Consolidation Act, (No. 42 of 1988), the text to be interpreted is the English text, and I confine myself to it. I can see no obstacle to interpreting the definition of "prison officer" in s 2 as meaning the chief officer or any other officer subordinate to him who is working in any prison. There is no special significance in the capital letters of "Chief Gaoler". Punctuation may be ignored. The term is not a title or position in S. 6. Resort to commonsense, another prime principle in statutory construction, suggests that, since the legislature did not amend s 2, it did not intend to change the force of s 2, and thus still intended to include in the definition of a prison officer the senior officer who carries out the duties defined in s 14. He is the one who has control of a prison and has prisoners committed to his custody. All officers working in prisons who are subordinate to that officer are included.

The defendant in the Court of Inquiry was charged as a prison officer. If the evidence satisfies the Court of Inquiry that he, whether subordinate or chief, was an officer under the Act working in a prison at the time of the matters under inquiry, and either giving or taking the orders necessary for the duties set out in s 14, then in my view, the court should find that prima facie he was at the time included in the s 2 definition. His position or job title may have no relevance if in fact he was charged in respect of acts performed while he was appointed to perform duties in a prison.

THE TONGAN WORDING OF THE STATUTE

Pursuant to s 11(2) of the Laws Consolidation Act, (No. 42 of 1988), the text to be interpreted is the English text. That factor is decisive. However, I was referred by both counsel to the Tongan version of the statute, and should make some remarks about that. It may be that the Court of Inquiry was influenced by the Tongan text. It is clear that the office of *Sela Lahi*, translated as "Chief Gaoler" in the English words of s 2, was not abolished in the amendment (in the Tongan words) of s 6. Indeed, not only was the office of *Sela Lahi* retained there, (in the plural *kau Sela Lahi)* but also a new position for prison officers, *kau Tokoni Sela Lahi* (Assistant *Sela Lahi* - plural), was created. However, *kau Sela Lahi* came out in the English

words of the amended s 6 as "Chief Warders" and *kau Tokoni Sela Lahi* was not in the English text at all, as the Court of Inquiry pointed out.

As well, the amendment of s 6 (in the Tongan words) created the new positions of *Pule 'o e ngaahi 'Api Popula* and *kau Tokoni Pule 'o e ngaahi 'Api Popula*, which appear in the English as "Superintendent of Prisons" and "Assistant Superintendents of Prisons". Therefore, if the Tongan words of this statute were to prevail, there might well be an insoluble conflict between Ss 2 & 6, since both are provisions for *kau 'ofisa 'o e ngaahi 'api popula*, but the amendment in Tongan changed them from being consistent provisions for *kau 'ofisa 'o e ngaahi 'api popula* to being inconsistent.

On the other hand, there is another small but significant difference between the texts which might overcome that inconsistency. S 2 in the Tongan words defines both *"Minisita Polisi"* and *"Ofisa 'o e 'Api Popula"* in identical initial words, "*'oku kau ki ha...*", yet the English text uses a different word in each case. The result of this is that in the English text the term "prison officer" **means** a Chief Gaoler (etc). The Tongan could have been translated, as it is in respect of the Minister in s 2, as "**includes**". In the English the definition of a prison officer has been made exclusive, and creates the inconsistency between s 2 and s 6. But in the Tongan words it could readily be argued that the new positions are not excluded from the definition.

In any event, there seem to be inconsistencies between the different texts. Doubtless, correction of these anomalies is within the unusual powers given to the Commissioner in the Laws Consolidation Act, but it has not so far been done.

DIRECTIONS TO THE COURT OF INQUIRY

For the reasons I have set out above, I make an order as sought, setting aside the decision of the Court of Inquiry dated 15 February 1999.

I make a further order directing the Court of Inquiry to proceed with its hearing of the charges before it, and to decide the issues necessary for disposal of each of those charges. The issues include the issue of whether the person charged is proved as a matter of fact to be within the definition at law of a "prison officer". In order to decide that issue, the Court of Inquiry is directed to apply to the proven facts the interpretation of that term which this Court has provided above.

I take the opportunity of commenting to the Court of Inquiry that the jurisdiction that it will exercise is the jurisdiction created by s 16 at paragraph (b). Before the person charged may be found guilty of any charge, the Court of Inquiry must be satisfied not only that the person charged is a prison officer, but also that the matters proved in respect of that charge are within the terms "serious breaches of good order or discipline or of any prison rule" (s 16). Those terms are the limit of its jurisdiction.

I make no orders for costs.

SUPREME COURT TONGA

NUKU'ALOFA 24 **May 1999** **JUDGE**