

passport bearing her own photograph but the name Orlandoni Wong. According to the details recorded in the passport it was issued in Tonga by the Ministry of Foreign Affairs on 14 May 2013 i.e. about 5 months before the Respondent's arrival in the Kingdom.

- [3] Some time after the seizure of the passport the Respondent was charged with three offences contrary to Section 21(1)(f) of the Passport Act (Cap 61). This Section was substituted by the Passport (Amendment) Act 24 of 2003. It later emerged that the 2003 Amendment Act had inadvertently not been brought into force and on 25 February 2014 the charges were withdrawn. The Police however continued to retain the passport and refused to return it.
- [4] The Respondent applied to the Magistrate's Court for an order that her passport be returned to her. The application was opposed by Mr Kefu who submitted (a) that the Respondent was not entitled to the return of the document to her and (b) that the criminal investigation into the circumstances in which the passport had been issued was continuing and accordingly retention of the passport by the police was still required. Mr Kefu indicated that he was considering whether to prefer alternative charges against the Respondent based on the Passport Act as it stood prior to its attempted amendment in 2003. Sections 19 and 22 were under consideration. The Magistrate called for written submissions and it was accepted that the Crown undertook to file its submissions by 4 March.
- [5] On 13 March Ms Tonga filed her own written submissions. She noted that the Crown had not complied with its undertaking. She advanced six grounds in support of her application for the passport to be returned.

On 17 March the Magistrate endorsed the written submissions as follows:

“Application is granted. The Prosecutor i.e. the Police is hereby ordered to release the passport R406475 to the Applicant forthwith. The Crown was given time to make submissions but have not done so.”

[6] Although the formal order signed on 18 March stated that the order for the release was based not only on the Crown’s failure to file its submissions but also on the “grounds stated on the application” none of the grounds was identified as having being accepted or rejected. There was, in other words, no actual adjudication on the merits of the grounds advanced. Although in the civil jurisdiction the failure to file a defence will give a Plaintiff the right to enter judgment without further ado, the situation is not the same in the criminal jurisdiction. In my opinion the Magistrate erred by not ruling on the merits of the individual grounds advanced.

[7] The six grounds, summarized, were as follows:

- (1). Any attempt by the Crown to prefer alternative charges against the Respondent would be in breach of Clause 13 of the Constitution;
- (2). Any attempt to put the Respondent on trial for those alternative charges would be in breach of Clause 12 of the Constitution;
- (3). The passport was the property of the Respondent and since

she was facing no criminal charges it should be returned to her. The seizure of the passport and its retention violated Clause 14 of the Constitution;

- (4). The passport was seized without a warrant and was therefore in breach of Clause 16 of the Constitution;
- (5). The Respondent was being punished by the retention of her passport in breach of Clause 10 of the Constitution; and
- (6). The retention of the Respondent's passport violated her right to a fair trial, contrary to Clause 14 of the Constitution.

[8] In my opinion grounds (1), (2) and (6) although open for argument in the event that the Respondent is again charged and placed on trial are premature at this stage of the proceedings. They are not relevant to the question before me which is whether the police can lawfully refuse to return the passport to her.

[9] Although the Passport Act does not state that a passport remains the property of the Government, Tongan passports at page three state:

“This passport is the property of the Tongan Government”.

In view of this assertion of the claim I am of the view that in the absence of anything to the contrary ground 3 fails.

[10] Mr Kefu told me that the passport was seized as a result of information received by a police officer exercising the powers conferred upon him

by Section 122 of the Police Act 2010. In view of the fact that the search of the Respondent yielded the passport in question, that identity theft is a notoriously prevalent mischief and that the Respondent was about to depart from Tonga, with the result that it would not have been reasonably possible to apply for a search warrant before she departed from the jurisdiction, I am satisfied that Section 122 was complied with. There was no search of premises in this case and accordingly Clause 16 is not engaged. The seizure was lawful and therefore ground 4 fails.

[11] In my view the retention of the passport does not “punish” the Respondent. I was told by Mr Kefu, without challenge, that the Respondent has a valid Chinese passport should she wish again to travel. Ground 5 fails.

[12] In my opinion the retention of passport R406475 by the police is above reproach. The Magistrate erred in ordering its release. The appeal is allowed.

NUKU’ALOFA: 23 May 2014.

**N.Tu’uholoaki
23/5/2014.**




CHIEF JUSTICE