IN THE SUPREME COURT OF TONGA

REGISTRAR GENERAL'S JURISDICTION

NUKU'ALOFA REGISTRY **RG 259 of 2011**

IN THE MATTER OF PETER DENZEL PAUL SCHAUMKEL

Mr S.V. Fa'otusia for the Applicant

Mr 'A. Kefu (Solicitor General) for the Crown

RULING

1. This is an application by Paul David Schaumkel (the Applicant) for the registration of his son Peter Denzel Paul Schaumkel (the son) as a Tongan subject.

2. The Applicant was born in Invercargill, New Zealand on 19 December 1958. He is the legitimate son of Peter Schaumkel who was born in Tonga on 23 January 1931. According to Vava'u Birth Certificate 67/31 both Peter Schaumkel's parents were also born in Tonga.

3. It seems that prior to 1935 there may have been no statutory definition of who is a Tongan subject. The first available definition is Section 2 of the Nationality (Amendment) Act 11 [or 12?] of 1935 which provides that:

> "(a) any person born in Tonga of Tongan parentage"
> shall be deemed to be a Tongan subject.

4. The situation prior to 1935 is governed by *Edwards v Kingdom of Tonga* [1994] Tonga L.R. 62 in which the Court of Appeal ruled that, absent any statutory provision to the contrary, the common law was to be applied. The Court held that since Mr Edwards had been born in Tonga he "owed natural allegiance to the Sovereign of Tonga and … was therefore a Tongan for the purpose of nationality". Because of

Clause 20 of the Constitution, no subsequent law could remove Mr Edwards' right to the nationality conferred on him by birth.

5. Applying *Edwards,* there is no reason to doubt that the Applicant's father Peter, was, by birth a Tongan subject.

6. On 14 September 1981 the Applicant's father Peter was naturalized as a New Zealand citizen. By operation of Section 4(1) of the Nationality Act (Cap 59 – the Act) as it then stood (until amended by Act 3 of 2007) he thereby ceased to be a Tongan subject. As already noted, the Applicant had already been born before this event occurred.

7. On 5 November 2010 the Applicant filed an application to have himself registered as a Tongan subject. He relied on the fact that at the time of his birth in 1958 his father was still a Tongan subject. In 1958 the relevant part of Section 2(a) of the Act, as it then stood, read 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 abroad :
>
> Provided" [not applicable]

8. In November 2010 the relevant part of Section 2 of the Act, which had again been amended by the Nationality (Amendment) Act 2007, read as follows:

> "The following persons shall be deemed to be Tongan subjects –
> (b) any person born abroad of a Tongan father ;
> (c) any person born abroad of a Tongan mother ;"

9. On 5 November 2010 the Applicant's registration as a Tongan subject was approved (RG 311/2010). It is not necessary to decide whether the 1935 provision or the 2007 provision was applied since, in both cases, the Applicant clearly qualified for registration.

10. On 8 December 2001 the Applicant married 'Ana Latai 'Alaiva'a who had been born at Nuku'alofa on 13 February 1978. It is not disputed that 'Ana (the mother) was and remained at all relevant times, a Tongan subject. Their son, Peter Denzel Paul Schaumkel (the subject of this application) was born in Auckland, New Zealand on 23 December 2002.

11. The present application was filed on 2 May 2011. The Applicant relied on both subsections (b) and (c) of Section 2; he pointed out that his son had been born outside Tonga in 2002 of a mother who was, at the time, a Tongan subject and of a father who became a Tongan subject in 2010.

12. Mr Kefu very firmly opposed the application. He relied on the Act as it stood in 2001 when the son was born and submitted that the 2007 amendment was not retrospective.

13. In 2001 the relevant part of Section 2 of the Act read as follows:

> "The following persons shall be deemed to be Tongan subjects-
> (a) …
> (b) any person born abroad of a Tongan father who was born in Tonga".

14. Mr Kefu, in careful written submissions, argued that since there was no mention of a Tongan mother in the Section and since the Applicant's father was not born in Tonga, the law, as it stood on the day the son was born, did not allow for his registration as a Tongan subject. Furthermore, Parliament did not intend, and the Constitution did not permit, the amended Act to operate retrospectively.

15. Mr Fa'otusia also filed detailed and helpful written submissions. Put simply, Mr Fa'otusia rejected the suggestion that the amendment was retrospective and emphasised that the previous version of Section 2 had been repealed and replaced; accordingly it was no longer the law.

16. The starting point for the interpretation of legislation must always be what is called in *Maxwell on the Interpretation of Statutes* (12 Edn Chapter 2) "The Primary Rule":

> "If there is nothing to modify alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences".

17. Applying the primary rule to the section as it now stands (as set out in paragraph 8 above) it will be noted:

    (i) that the use of the word "shall" implies futurity;

(ii) that the words “any person born” are not qualified by any limiting expression such as “following the commencement of this Act”;
(iii) that the word “Tongan” is used without any qualification such as “a Tongan-born” father or mother; and
(iv) that naturalized Tongan subjects are not excluded.

18. In these circumstances, I would hold that the plain wording of the section, unless for some reason that meaning cannot be followed, is to provide that any person born abroad, whenever born, whether before or after the commencement of the amended Act, shall henceforth be deemed to be a Tongan subject if he or she has or had a Tongan parent who was either Tongan by birth or become Tongan by naturalization.

19. Mr Kefu suggests that such an interpretation of the section is excluded because it would give retrospective effect to the amended Section.

20. As *Maxwell* (page 215) points out:

> “It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication”.

In Tonga there is the further restriction imposed by Clause 20 of the Constitution:

> “It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws”.

21. In *Fulivai v Kaianuanu* [1924-1961] Tonga L.R. 178 the Privy Council explained that:

> “It is clear that Clause 20 does not forbid the passing of any laws which affect rights existing at the time of their enactment. It would of course be rather unusual if it had done so, because almost all legislation affects the rights of some person or other in the community. If the Legislature was precluded from passing any enactment that affected the rights of anyone existing at the time, its law making powers would be severely restricted and limited in a most unusual manner. Clause 20 of the Constitution does not even forbid the passing of retrospective laws. What it does do however is to forbid the

> enactment of laws which are both (a) retrospective in effect; and (b) affect the rights of persons which exist at the time the laws are enacted".

22. The Privy Council went on to say :

> "All that has been done [in this case] is to enact that in future the line of descent shall be altered in certain circumstances and that the new line of descent shall be ascertained by reference to certain events that happened in the past. In our opinion legislation of this character does not fall within the meaning of the term "retrospective legislation".

23. This approach is exactly that adopted in *Master Ladies Tailors v Minister of Labour and National Service* [1950] 2 All E.R. 525 in which Somervell L.J. at 527 B said:

> "The fact that a prospective benefit is in certain cases to be measured by or depends on antecedent facts does not necessarily … make the provision retrospective".

The Court quoted Lord Denman CJ who in *R v Christchurch* (*Inhabitants*) (1848) 12 QB149 had said:

> "… we have before shown that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its' action is drawn from time antecedent to its passing".

24. *Master Ladies* was cited with approval in Tonga in *Bennett v Bennett* [1989] Tonga L.R. 45 in which it was held that the Divorce (Amendment) Act 1988 which substituted a 2 year for the previous 5 year separation period was not retrospective, even though part of the period of separation pre-dated the commencement of the amended provision.

25. In the present case I take the view that the Act's operation (as amended) is prospective rather than retrospective. For the reasons given I do not think its dependency on antecedent facts namely birth before the commencement of the amended Act, makes the Act retrospective.

26. Mr Kefu placed heavy reliance on the words of the Court of Appeal in *Edwards*. At page 64 line 100 the Court stated:

> "But a person's nationality is determined at the date of his birth …"

In my view these words are not to be taken to mean that a person's nationality is *finally* or *once and for all* or *conclusively* to be determined at the date of his birth. Were that the case then there would be no such thing as naturalization or forfeiture of nationality. In my opinion the words should be taken to express the rule that in assessing a person's nationality, the starting point is his nationality at the time of birth. Such an assessment does not prevent that person subsequently gaining another nationality either in addition to, or in substitution for, that already held.

27. In paragraphs 53 to 64 Mr Kefu advanced three further arguments against the Act being applied retrospectively. He suggested, first, that the effect of the repeal of Sections 4 to 7, if so applied, would be to restore rights under the Land Act to those deprived of their rights by the operation of the repealed Sections. Such a situation is not before me for full argument and I offer no more than an opinion on the submission. An Act will usually have many consequences. If the Act is applied retrospectively so as to deprive persons of rights which they already possess, for example rights to land, then that application will be unconstitutional. If, as in the case of this application, the Act is being applied prospectively without any retrospective removal of rights then that application is unobjectionable. It is, in any event, the applicability of Section 2 of the Act which is now in question, not Section 17.

28. Mr Kefu secondly suggested that if the repeal of Sections 4 to 7 of the Act was applied retrospectively then there would be no need for the Nationality (Re-Admission) Regulations 2007. In my view there is nothing in the 2007 Amendments to suggest that the loss of citizenship which occurred prior to the repeal of the Sections was to be undone. The new Section 17 is prospective and successful applicants obtain fresh Tongan citizenship, not the former citizenship (with associated rights as they then stood) which they formerly lost.

29. In paragraph 64 of his submissions Mr Kefu suggested that if the Court ruled against his contentions there might be the result that visa fees already paid would have to be refunded. Such a repayments are

sometimes a consequence of Court rulings but I am not aware of any case where this has been considered a good enough reason not to interpret the law in the way the Court considers correct.

30. Mr Kefu's final submission was that:

> "… the Crown's legal position should be adopted and maintained because not only is that position the legal position, this position maintains consistency and certainty. In other words it would be very disruptive for government and the public to suddenly change its legal position regarding the 2007 Amendment".

With the greatest respect, my view is that by granting this application the court is *not* applying the legislation retrospectively and if applications of a similar kind have been refused on the grounds of retrospectivety then they have been wrongly refused. Consistency is desirable but only when the policy being applied is correct. If the consequences of interpreting the law are deemed by Government to be sufficiently "disruptive" then the law can be amended. The present ruling only applies to the registration of persons as Tongan subjects. It may possibly have some bearing on land and other matters but is in no way determinative of those other, as yet unraised issues.

31. I grant the application sought and declare that Peter Denzel Paul Schaumkel born 23 December 2002 is entitled to registration as a Tongan subject.

M.D. Scott

DATED: 30 August 2011. **REGISTRAR GENERAL**

N. Tu'uholoaki
29/8/2011