IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION) **MISC NO. 737/2022**

BETWEEN FRIENDS OF FIJI INC.

Applicant

AND ATTORNEY-GENERAL

Respondent

Hearing: 8 May 2023

Appearances: Ms L Rokoika for Applicant
Ms G Rood and Ms M Pittman for Respondent

Date: 7 March 2024

JUDGMENT OF KEANE, CJ

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[1] On 6 December 2021 the Cook Islands Immigration Act 2021 'An Act to reform the law of immigration'[1], received the Queens Representative's assent, and came largely into effect.[2]

[2] On 14 April 2022 the Cook Islands Immigration Regulations 2022 came into effect by Order in Council[3]; and on 18 April 2023, by further Order in Council, the Cook Islands Immigration Regulations 2023 replaced them[4].

[3] On 26 May 2022 Friends of Fiji brought this application challenging the residency threshold for permanent residence set by the 2022 Regulations – in the case of New Zealand citizens, five years; as to anyone not a New Zealand citizen, 10 years.[5]

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1 CIIA 2021, long title.
2 CIIA 2021, s 2(2); other parts came into effect on 18 April 2023 by Order in Council, S 2(1), Commencement Order 2023.
3 Order in Council, 14 April 2022.
4 Order in Council, 18 April 2023.
5 CIIR 2022, r 12(1)(c), r 22 (c).

[4] Friends of Fiji contends this threshold is unlawful and without effect. First the distinction it makes between New Zealand citizens and others is neither contemplated, nor authorised, by the CIIA. It is indeed beyond the scope of that Act. Second, it discriminates against everyone not a New Zealand citizen, contravening Art 64(1)(b) of the Cook Islands Constitution.

[5] On 14 July 2022 the Attorney-General, in his notice opposing the application, contended the distinction lay within the CIIA's wide regulation making power; and is proportionate and within Art 64(2). It is not new policy, and reflects the Cook Islands' special constitutional relationship of free association with New Zealand.

[6] On 8 May 2023 I heard this case by AVL; and I asked for supplementary submissions as to the principles governing the legislative delegation of power to make secondary legislation, especially where that intersects with guaranteed rights. Those submissions were filed within a month.

[7] On 12 August 2023 I issued a minute pointing out that on 18 April 2023 the 2022 Regulations had been replaced by the 2023 Regulations; and that, while the 2023 Regulations maintained the residency distinction under challenge, it was expressed in a new way. I also asked for submissions on two issues not earlier canvassed;

[8] The first was as to the status of the 'Joint Centenary Declaration Of The Principles Of The Relationship Between The Cook Islands And New Zealand', executed on 11 of June 2001 by the two Prime Ministers.

[9] I asked whether it had the status of a treaty and whether, if it did, it could be given effect in secondary legislation without first being ratified by the Cook Islands Parliament in primary legislation. This went especially to whether the distinction between residents, who are New Zealand citizens and those who are not, could lie within the scope of the CIIA 2021, unless concretely expressed there.

[10] The second was as to the extent to which New Zealand had already given preference to Cook Islands citizens, making them New Zealand citizens with equal rights; legislative acts still having the force of Cook Island law after independence. This went especially to whether the distinction could be unlawfully discriminatory.

[11] I now see this application as raising three primary issues, those arising from the applicant's two initial grounds, preceded by a third. [6] What is the status of the Joint Declaration? Is it a treaty? Must it be expressed legislatively by the Cook Islands Parliament? At the date of the declaration had that happened already as to permanent residency? What is the position now?

[12] I begin by setting these three primary issues against the relationship between the Cook Islands and New Zealand as to citizenship and residency as it has evolved thus far.

CI-NZ CITIZENSHIP AND RESIDENCY

[13] In 1901 the United Kingdom declared the Cook Islands to lie within the colony of New Zealand; the United Kingdom having itself assumed sovereignty the year before.

[14] In 1948 Cook Islanders, who were British citizens, became New Zealand citizens under the British Nationality and New Zealand Citizenship Act 1948 (NZ). 'New Zealand' was defined to include the Cook Islands and, therefore, Cook Islanders enjoyed all the rights and privileges the Act conferred. Section 33 stated the Act itself was to have effect in the Cook Islands.

[15] In 1965 the Cook Islands became independent. The Cook Islands Constitution Act 1964 (NZ) declared the islands to be 'self-governing', except for external affairs and defence. The 'supreme law' was to be the constitution annexed to the Act[7]; the Constitution as it now is, though these days extensively amended. The status of Cook Islanders as New Zealand citizens under the 1948 Act was expressly preserved.

[16] Article 77 of the Constitution itself preserved all law then in force in the Cook Islands until repealed or amended, confirming that Cook Islanders remained New Zealand citizens under Cook Islands law, as well as New Zealand law. (This aspect of the Constitution has since been amended, as I will say later.)

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6 Unfortunately, this minute did not reach counsel until 11 October 2023 and I received the second of their further submissions in late November 2023.

7. Cook Islands Constitution, Art 4.

[17] Article 39 conferred on the Cook Islands Parliament the power, subject to the Constitution, to 'make laws (to be known as Acts) for the peace, order, and good government of the Cook Islands'.

[18] In the Entry, Residence and Departure Act 1971-72 the Cook Islands Parliament set the threshold for permanent residence for non-Cook Islanders. The Minister responsible became able to issue such a certificate to those of good character and standing, who had made their home in the Cook Islands, and resided continuously there for a qualifying period.

[19] For a New Zealand citizen that was, 'a period of three years, or such shorter period (being not less than one year) as the Minister may accept'. For a non-New Zealand citizen it was 10 years, or not less than five years if the Minister allowed. (Reasonable periods away for holiday or business purposes were not disqualifying.)

[20] On 4 May 1973 the New Zealand Prime Minister, the Rt Hon Norman Kirk, wrote to the Cook Islands Premier, the Hon A R Henry, confirming that New Zealand recognised the independent status of the Cook Islands; and saw the relationship as one of free association, depending upon 'shared interests and shared sympathies'.

[21] In that letter the Rt Hon Norman Kirk identified what he saw to be 'the central feature of the constitutional relationship between [the] two countries':

> By their own express wish, the people of the Cook Islands remain New Zealand citizens. Like other New Zealand citizens, they owe allegiance to Her Majesty the Queen in right of New Zealand, and they acknowledge the Queen in her New Zealand capacity as their Head of State. In this way the Cook Islands people retain the right to regard New Zealand as their own country, even while they enjoy self-government within the Cook Islands.

[22] His only expectation, in response, was that the Cook Islands would 'uphold, in their laws and policies, a standard of values generally acceptable to New Zealanders', respecting, as he said a little later, 'New Zealand's determination to safeguard the values on which its citizenship is based'.

[23] He ended his letter, suggesting that their exchange of letters:

> … be tabled by our respective Governments in the Cook Islands Legislative Assembly and in the New Zealand Parliament, as an indication to all who are interested [in] the true nature of the ties between our two countries.

[24] In his letter in response, dated 9 May 1973, the Hon Albert Henry confirmed the Cook Islands Government shared the views expressed, and agreed the exchange of letters should be tabled formally.

[25] Cook Islanders retained their New Zealand citizenship under the Citizenship Act 1977 (NZ), which also defines 'New Zealand' to include the Cook Islands. Section 29(1), furthermore, states this:

> Whereas in accordance with Article 46 of the Constitution of the Cook Islands (as set out in the Second Schedule to the Cook Islands Constitution Amendment Act 1965) the Government of the Cook Islands has requested and consented to the enactment of a provision extending all of the provisions of this Act to the Cook Islands as part of the law of the Cook Islands: Be it therefore enacted as follows: The provisions of this Act shall extend to the Cook Islands as part of the law of the Cook Islands.

[26] Article 46, as it then was, titled 'Power of New Zealand Parliament to legislate for the Cook Islands', underpinned s 29(1) and confirmed Cook Islanders were to have New Zealand citizenship under Cook Islands as well as New Zealand law. [8]

[27] On 5 June 1981 the Constitution Amendment Act 1980-81 amended Art 46 to say 'New Zealand Parliament not to legislate for the Cook Islands'.[9] It is not retrospective and Cook Islanders continue under Cook Islands law to have New Zealand citizenship under s 29(1).

[28] The Constitution Amendment Act 1980-81 also introduced, highly materially, Art 76A, titled 'Persons entitled to permanent residence'. The Entry, Residence and Departure

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[8] Article 46, 'Power of New Zealand Parliament to legislate for the Cook Islands' said this:[8]

> (1) No Act, and no provision of any Act, of the Parliament of New Zealand passed on or after Constitution Day shall extend or be deemed to extend to the Cook Islands as part of the law of the Cook Islands, unless –
>
> (a) The passing of that Act or the making of that provision, so far as it extends to the Cook Islands, has been requested and consented to by the Government of the Cook Islands; and
>
> (b) It is expressly declared in that Act that the Government of the Cook Islands has requested and consented to the enactment of that Act or of that provision.
>
> (2) Every such request and consent shall be made and given by resolution of the Legislative Assembly or, if the Assembly is not sitting at the time when the request and consent are made and given, by the High Commissioner, acting on the advice of Cabinet.

[9]. Article 46, as it became under the Constitution Amendment Act 1980-81 (CI),

> Except as provided by Act of Parliament of the Cook Islands, no Act, and no provision of any Act, of the Parliament of New Zealand passed after the commencement of this Article shall extend or be deemed to extend to the Cook Islands as part of the law of the Cook Islands.

Act 1971-72 then remained in force, securing as I have described qualifying preference for New Zealand citizens.

[29] On 11 June 2001 the Prime Ministers of the Cook Islands and New Zealand executed the 'Joint Centenary Declaration Of The Principles Of The Relationship Between The Cook Islands And New Zealand'.

[30] The final phase of this evolution is CIIA 2021 and CIIR 2023, giving rise to the three primary questions I am to resolve; the first is as to the status and effect of the 2001 joint declaration.

[31] Does it require that New Zealand citizens seeking permanent residence in the Cook Islands be accorded legislative preference; and must that be by primary legislation or may it be by secondary legislation?

1: DOES THE 2001 DECLARATION REQUIRE PREFERENCE BY STATUTE?

[32] The Joint Centenary Declaration, dated 11 June 2000, signed by the Prime Ministers of the Cook Islands and New Zealand, on behalf of their respective Governments, sets out as its title says, 'the principles of [their] relationship'.

[33] The preamble records the two countries had been in a formal relationship since 1901; and, after the Cook Islands became independent in 1965, entered into a free association on fundamental principles confirmed in the 1973 exchange of letters.

[34] The preamble records that this relationship had evolved, and was unique; and that the declaration's purpose was to strengthen it by restating the principles underpinning their 'partnership and free association … as equal States independent in the conduct of their own affairs'.

[35] Two questions arise, as I said at the outset. Does the declaration have the status of the treaty? If it does, did it when entered into require any legislative response? If it did not require such a response then, does it require such a response now?

Declaration status

[36] A treaty, as Lord Atkin said in *Attorney-General for Canada v Attorney-General for Ontario*, a decision of the Judicial Committee of the Privy Council, the Cook Islands' ultimate appeal tribunal, is quite simply: 'any agreement between two or more sovereign States'.[10]

[37] Nothing turns on the title. As the NZ Law Commission says in its related report. There may be a treaty by exchange of letters, or by way of bilateral declaration, or under a variety of other titles.[11] Nor does anything turn on the subject matter. As the report also says:[12]

> .. there is no limit to the matters which states may wish to bring under an international agreement, and over recent decades there has been an explosion of areas of international concern.

[38] The more important question is what does the accord, whatever its name, do. The 1973 exchange of letters looks unlikely to be a treaty. It simply affirmed the fundamental principles then underpinning the CI-NZ relationship, as they do still. It did not require anything more specific.

[39] The 2001 Joint Declaration, by contrast, covers seven topics: partnership, citizenship, head of state, foreign affairs, treaties, diplomatic and consular relations, defence and security. Some, like the 1973 exchange, simply affirm shared principles. Clause 2, 'Citizenship', imposes specific obligations.

[40] I conclude that the 2001 Joint Declaration, in contrast to the 1973 letter exchange, to the extent that it does impose mutual obligations between two sovereign states, must be deemed to be a treaty.

Formation and performance

[41] Treaties are entered into by the Executive but, to be performed, may require primary legislation, the sole province of Parliament. This 'basic constitutional principle' as the NZ Law Commission describes it, is this:

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10 *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347-348.
11 'A New Zealand Guide to International Law and its Sources', Report 34, May 1996, paras 18-21.
12 Ibid, para 25.

> … the executive cannot, by entering into a treaty, change the law. In addition to the prerogative steps taken by the executive to become party to the treaty, legislation is in general needed if the treaty is to change the rights and obligations of individuals or to enhance the powers of the state.
>
> The reason lies in the concept of the separation of powers: if the treaty affects rights and duties under national law, then the treaty becomes the concern of the legislature and not merely the executive (which will have negotiated the treaty).[13]

[42] As Lord Atkin said in the Canadian case, in a passage I have divided into four:[14]

> … there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.
>
> … the stipulations of a treaty duly ratified do not … by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of the treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes.
>
> Parliament, no doubt, … has a constitutional control over the executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone.
>
> Once they are created, while they bind the State as against the other contracting parties, Parliament may refuse to perform them and so leave the State in default.

Primary and secondary legislation

[43] The NZ Law Commission then comments in its report on the question central to this application: when and how, especially where a treaty is technical and regulatory, may Parliament delegate legislative power to the Executive.[15] The Commission endorses this comment by the Legislation Advisory Committee:[16]

> The line between the primary and the delegated lawmaker should in general be that between principle and detail, between policy and its implementation. Parliament … should address and endorse (or not) the policies presented to it by the executive, while recognising that matters of less significance or of a technical character … might be left to subordinate law making.

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13 'A New Zealand Guide to International Law and its Sources', NZ Law Commission, Report 34, May 1996, paras 43-44.

14 *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347-348.

15 'A New Zealand Guide to International Law and its Sources', NZ Law Commission, Report 34, May 1996, paras 62 – 63.

16 Legislation Advisory Committee, 'Legislative Change: guidelines on process and content' (2nd ed, Report No 6, 1991, para 113.)

[44] In 2016, in the *Public Law Project* case[17] the UK Supreme Court stated the fundamental constitutional principles engaged:

> … Primary legislation is initiated by a Bill which is placed before Parliament. To the extent that Parliament considers it appropriate, all or any of the provisions of a Bill can be subject to detailed scrutiny, discussion, and amendment in Parliament before being formally enacted as primary legislation; … [20]
>
> Subordinate legislation consists of legislation made by members of the Executive (often… by Government ministers), almost always pursuant to an authority given by Parliament in primary legislation. … [21]
>
> Although they can be said to have been approved by Parliament [by various means in the UK], draft statutory instruments … are not subject to the same legislative scrutiny as bills; and, unlike bills, they cannot be amended by Parliament. Accordingly, it is well established that, unlike statutes, the lawfulness of statutory instruments (like other subordinate legislation) can be challenged in court. … [22]
>
> Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is *ultra vires*, that is, outside the scope of the statutory power pursuant to which it was purportedly made. In declaring subordinate legislation to be invalid in such a case, the court is upholding the supremacy of Parliament over the Executive. … [23]
>
> That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned. Accordingly, when, it is contended that … subordinate legislation is *ultra vires,* it is necessary for a court to determine the scope of the statutorily conferred power to make that legislation. [23]

[45] This distinction between primary and secondary legislation may well explain, I consider, why in the past the Cook Islands Parliament has given direct and explicit effect by primary legislation to bilateral and multilateral treaties entered into by the Executive.

Cook Islands Statutes

[46] The Chemical Weapons (Prohibition) Act 2007 (CI) is one example of this intersection in the Cook Islands between the Executive and Parliament. The long title to that Act is:

> An Act to give effect to the provisions of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction and for related matters.

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[17] *R (The Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531, paras 20-23.

[47] A closer example may the Civil Aviation Agreement Act 1968 – 69 (CI), though there the agreement itself, in contrast to the Joint Declaration, required the agreement be tabled in Parliament. Its long title is this:

> An Act to provide for the confirmation of a Civil Aviation Agreement between the Government of the Cook Islands and the Government of New Zealand.

[48] A more comprehensive example is the Civil Aviation Act 2002 (CI), s 2 of which states its purpose:

> The purpose of this Act is to –
>
> (a) Establish rules of operation and divisions of responsibility within the civil aviation system in order to promote aviation safety and security; and
>
> (b) Ensure that the Cook Islands obligations under international aviation agreements are implemented.

[49] Central to that Act is a 'Convention'[18]: 'the Convention on International Civil Aviation ratified by the Cook Islands through the Cook Islands' Instrument of Adherence effective 19 September 1986'; as well as any ratified amendment or annex, and:

> The international standards and recommended practices from time to time accepted and amended by the International Civil Aviation Organisation pursuant to article 37 of the Convention.

[50] So too section 6(1) defines the 'primary function' of the Minister responsible to be this:

> … to promote safety and security in civil aviation at a reasonable cost, and to ensure that the Cook Islands' obligations under international civil aviation agreements are implemented.

[51] The Minister, and the Director of Civil Aviation, have extensive rule-making powers. Section 106 enables the Queen's Representative to make general regulations for specific purposes, and for:

> Such other matters as are contemplated by or necessary for giving full effect to the provisions of this Act and for its due administration.

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[18] Civil Aviation Act 2001, s 3, 'Convention'.

[52] In that Act the issues on this application do not begin to arise. The purpose of the wide rule making power conferred is clear. It is to ensure the Executive is able to comply with treaty obligations Parliament has endorsed.

Article 2: 'Citizenship'

[53] The issue on this application is, therefore, this: at the date of the Joint Declaration did Clause 2 require any legislative act on the part of New Zealand or the Cook Islands; and what is the position now?

[54] Article 2.1 imposed on New Zealand an obligation to ensure Cook Islanders retained New Zealand citizenship, on terms consistent with the 1973 exchange:

> The people of the Cook Islands will retain New Zealand citizenship respecting and upholding the fundamental values on which that citizenship is based. The Cook Islands and New Zealand share a mutually acceptable standard of values in their laws and policies, founded on respect for human rights, for the purposes and principles of the United Nations Charter, and for the rule of law.

[55] At that date no legislative act was required on New Zealand's part. Nor has any been required since. In 2021 the Citizenship Act 1977 (NZ) directly secured for Cook Islanders New Zealand citizenship under New Zealand and Cook Islands law. It does so still.

[56] Article 2.2 imposed on the Cook Islands, for the first time, an obligation to grant New Zealanders preference as to entry and residence

> The Government of the Cook Islands will accord New Zealand citizens preferential consideration in respect of entry into and residence in the Cook Islands.

[57] At that date no legislative act was required on the Cook Islands' part as to residence. In 2001 the Entry, Residence and Departure Act 1971-72 (CI) directly accorded New Zealanders very significant preference.

[58] On 6 December 2021, however, CIIA 2021 repealed ERDA 1971-72,[19] and does not directly confer on New Zealanders any such preference. Nor does it state that in principle.

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[19] CIIA 2021, s 232.

Instead, that preference is accorded by CIIR 2023; an act of the Executive.[20]

[59] The Crown contends that by CIIA 2021 Parliament delegated that ability to the Executive, and so the answer to this first primary issue depends on the answer to the second to which I am about to come

[60] What is the effect of Art 76A of the Constitution, which stipulates how permanent residence is to be conferred? To be within the scope of CIIA 2021 must that Act explicitly identify and endorse the New Zealand preference? Does any related delegation depend on that?

[61] For reasons I am about to give, I do not consider CIIA 2021 and CIIR 2023 incompatible with Art 76A. I do consider the obligation to accord the New Zealand residence and entry preference, assumed in the 2001 joint declaration, should have been endorsed explicitly by Parliament in CIIA 2021.

2: IS THE PRESENT PREFERENCE VALIDLY CONFERRED?

[62] Article 76A(1) confirms that anyone born in the Cook Islands has that status, subject to three contingencies, which need not concern us. Article 76A(2), which is in point, says:

> Any person may apply, pursuant to the provisions of an Act of Parliament, for a certificate granting to him the status of a permanent resident of the Cook Islands.

[63] Article 76A(3) prescribes what the Act envisaged may do:

> An Act may –
>
> (a) Prescribe the qualifications to be held by a person to whom subclause (2) of this article applies who is an applicant for such a certificate, and the circumstances in which such an applicant is disqualified from being granted such a certificate; and
>
> (b) Prescribe the conditions subject to which such a certificate may be granted to a person to whom subclause (2) of this article applies; and
>
> (c) Confer on a Minister a discretion to grant or refuse such a certificate to a person to whom subclause (2) of this article applies; and

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[20] The Order in Council, dated 18 April 2023, states, 'Pursuant to section 227 … His Excellency the King's Representative, acting on the advice and with the consent of the Executive Council, makes the following regulations …'.

> (d) Prescribe the circumstances in which such a certificate granted may be revoked; and
>
> (e) Prescribe the number of permanent residence certificates that may for the time being, be in effect.
>
> …

[64] Article 76A(5) concludes:

> Nothing in this Article shall affect the status as a permanent resident of the Cook Islands of any person holding that status pursuant to the Entry, Residence, and Departure Act 1971-72, immediately before the commencement of this Article.

Entry, Residence and Departure Act 1971-72

[65] When Art 76A took effect in 1980,[21] ERDA 1971-72 prescribed, essentially, what Art 76A (3) contemplates, as Art 76A(5) confirms.

[66] As I said earlier s 5 , as enacted in 1971-72, enabled the Minister responsible for immigration to grant by certificate permanent residence to applicants satisfying four criteria, the last of which, s 5 (1)(d)(i), directly conferred the New Zealand preference:

> Being a New Zealand citizen, has resided continuously in the Cook Islands for a period of three years, or such shorter period (being not less than one year) as the Minister may accept, immediately preceding the date of his application (which period shall be deemed not to have been interrupted by a reasonable period or periods of absence from the Cook Islands for holiday or business purposes):

[67] That this constituted a preference is evident the moment it is compared with the qualifying period applying to every other applicant, under s 5 (1) (d)(ii):

> Not being a New Zealand citizen, has resided continuously in the Cook Islands for a period of 10 years, or such shorter period (being not less than five years) as the Minister may accept, immediately preceding the date of his application (which period shall be deemed not to have been interrupted by a reasonable period or periods of absence from the Cook Islands for holiday business purposes).

[68] In 2001, when the Joint Declaration was entered into, as I have said, these contrasting qualifying periods continued to apply and fully satisfied the obligation the Cook Islands assumed under Art 2.2.

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[21] Constitution Amendment (No.9) Act 1980-81, s 13.

[69] CIIA 2021, and the regulations it contemplates, as I have said, is to a different scheme. It does not prescribe the principles governing permanent residence and entry. By and large it delegates that power to the Executive. Does that, to begin with, accord with Art 76A?

Three step analysis

[70] To decide the validity of the New Zealand preference in CIIR 2023, challenged on this application, I must, as Lord Diplock stated in *McEldowney v Forde*:[22]

> … determine the meaning of the words used in the Act itself to describe the subordinate legislation … authorised … , secondly, … determine the meaning of the subordinate legislation itself and finally … decide whether the subordinate legislation complies with that description.

[71] The first step, then, is to identify the scope of CIIA 2021, as an earlier NZ decision[23]states, by such 'fair, large and liberal interpretation as will best attain its objects'. For as the Court there said of the regulatory provision challenged:

> If it is within the objects and intention of the Act, it is valid. If not, however reasonable it may appear, or however necessary it may be considered, it is ultra vires and void.

[72] The precise 'objects and intention' of CIIA 2021 are therefore critical; and, if they cannot be readily discerned, a widely stated delegation to the Executive to make whatever regulations may seem called for is no answer.

[73] In the *Public Law Project* case, the power delegated to the Executive was to amend a schedule to the empowering Act (a Henry VIII power); a delegation calling for the closest scrutiny. But the UK Supreme Court approached it as it would any other delegation, endorsing the following statement from a leading text:[24]

> … as with all delegated powers the only rule for construction is to test each proposed exercise by reference to whether or not it is within the class of action that Parliament must have contemplated when delegating. Although Henry VIII powers are often cast in very wide terms, the more general the words by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's contemplation.

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22 *McEldowney v Forde* [1971] AC 632 (HL), 648.
23 *Carroll v Attorney-General for New Zealand* [1933] NZLR 1461 (CA), 1478.
24 *R (The Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] AC 1531, para 26.

[74] The short point is that a widely expressed delegation is not to be taken literally. If the empowering statute is indefinite as to its own purposes and scope, a wide delegation cannot be a cure all. It can even be a trap.

[75] The three Cook Islands statutes, to which I have referred, especially the Civil Aviation Act 2002, are definite enough to identify the purpose and scope of Parliament's delegation to the Executive; and thus to foreshadow the purpose and scope of any secondary legislation they call for.

[76] CIIA 2021, as I have said, is to a different scheme. It sets a framework for the grant of permanent residence and entry. But not, by and large, any governing principles. It delegates to the Executive, almost wholesale, the power to create that regime by secondary legislation. Hence the present debate.

CIIA 2021

[77] The single declared purpose of CIIA 2021 is, as s 3 states it, very abstract :

> … to manage immigration to the Cook Islands in a way that balances the national interest, as determined by the Crown, and the rights of individuals.

[78] Parts 3-5 identify those with a right of residence: Cook Islanders, honorary residents and permanent residents. Part 5, ss 34-52, govern the last of these categories, permanent residents. According to s 34 a permanent resident may be so 'by descent', or by grant; and, according to s 37, the number at any one time is limited to 500 persons, excluding those by descent and other limited exceptions.

[79] Section 38, which prescribes 'Eligibility for grant of permanent residence by certificate', is central to this application; and depends for its efficacy largely on regulation, as I now emphasise:

> (1) The following are the 3 categories of persons who are granted permanent residence by certificate on application, as a consequence of being eligible for permanent residence:
>
> (a) a person who is a permanent resident in their own right:
>
> (b) a person who is a permanent resident as a consequence of being a spouse of a Cook Islander or permanent resident:

(c) a person who is a permanent resident as a consequence of being an eligible child.

(2) The *criteria* that a person must satisfy in order to be eligible for the grant of permanent residence in any of the categories set out in subsection (1) *are prescribed in the regulations*.

(3) The Minister must –

(a) decide whether a person is eligible for the grant of permanent residence by certificate in accordance with the *procedures and criteria prescribed in the regulations*; and

(b) *if the person is eligible under the regulations* for the grant of permanent residence by a certificate, decide that they are so eligible; and

(c) grant the person permanent residence by a certificate *in accordance with the procedure set out in the regulations*, and subject to the provisions of this Act.

[80] Section 39, 'Process to be followed to apply for permanent residence (other than by descent)', is equally material:

(1) The process that must be followed to apply for permanent residence (other than through descent) is the process set out in 1 or more of the following:

(a) this Act;

(b) the regulations;

(c) immigration policy.

(2) The process referred to in subsection (1) may, without limitation, include –

(a) providing for the lodging of expressions of interest by persons wishing to apply for permanent residence:

(b) providing mechanisms for assessing the number of expressions of interest against criteria to allow applications for permanent residence to be invited:

(c) providing mechanisms for consulting on applications for permanent residence with Ministers of the Crown, government agencies, traditional chiefs, or other relevant persons or groups:

(d) providing mechanisms to enable applications for permanent residence to be ranked to enable the available number of positions to be filled:

(e) providing for the lapse of applications.

[81] The Minister has power under s 42 to grant permanent residence within his or her absolute discretion subject to a duty to consult and other safeguards; and, conversely, under s 51, the power to revoke permanent resident status.

[82] Section 227 (1) confers the power to make regulations; and it, too, is central to this application:

> The Queen's Representative may, by order in Executive Council, make regulations –
>
> (a) prescribing anything required or authorised to be prescribed under this Act; and
>
> (b) for anything that is necessary or desirable for carrying this Act into effect.

[83] Section 227(2)(b) begins by authorising regulations relating to permanent residence and every permit class and type, which may include 'without limitation':

> (i) information requirements for applications to support immigration decision-making:
>
> (ii) the ranking of any application, or any class or type of person without continuing rights, for permanent residence or a visa or permit of a particular class or type:
>
> (iii) the process for deciding applications for permanent residence, or any visa or permit of a particular class of type:

Section 227 (2)(b)(v) authorises regulations prescribing:

> the general or specific health and character requirements applying to an applicant for permanent residence or for any visa or permit class or type or any visa or permit waiver, and in respect of any class of person without continuing rights:

So too, s 227 (2) (b) (vii) regulations prescribing:

> any indicators, attributes, or other relevant information on matters that may or must be considered in making a decision about the grant of permanent residence, or a visa or permit waiver:

[84] Finally, s 227 (3) authorises regulations particular to Rarotonga and to the Pa Enua, and in relation to different islands within the Cook Islands.

CIIR 2023

[85] Permanent residence is governed by Part 1 of the 2023 Regulations;[25] And those

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[25] CIIR 2023, Part 1 Subparts: 1. 'Invitations for expressions of interest for permanent residence'; 2. 'Applications for grant of permanent residence in own right'; 5. 'Applications for recognition as permanent resident by descent'; 6. 'Other requirements regarding permanent residence'.

seeking permanent residence must pass through a two phase process: seek and obtain approval to apply, and apply and succeed.

[86] The residence qualification under challenge, five years for a New Zealand citizen, 10 years for everyone else, is essential for first phase approval; a phase only the Minister can trigger by inviting expressions of interest from those wishing to apply for permanent residence in their own right.[26]

[87] Once the Minister does that, reg 7 triggers Subpart 2, 'Applications for grant of permanent residence in own right'; and reg 8 is central to this application. It governs 'expression of interest for grant of permanent residence in own right':

> (1) A person expresses an interest in becoming a permanent resident in their own right by –
>
> (a) Lodging an expression of interest under this regulation; and
>
> (b) Paying the prescribed fee.
>
> (2) An expression of interest must be in the form approved by the principal immigration officer and must –
>
> (a) state the person's intention to become a permanent resident; and
>
> (b) state that the person satisfies the criteria for the grant of permanent residence in their own right; and
>
> (c) enclose an evidence of identity document for the person; and
>
> (d) enclose evidence, if required by the principal immigration officer, of the person having lived continuously in the Cook islands, -
>
> (i) in the case of a person who is not a New Zealand citizen, for at least 10 years; or
>
> (ii) in the case of a person who is a New Zealand citizen, for at least 5 years
>
> …

[88] Regulation 9, which is also central, governs 'Invitation to apply for grant of permanent residence in own right':

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[26] Subpart 1, Reg 4, which gives effect to s 40 (1) of CIIA 2021, governs invitations by the Minister. See also CIIA 2021, section 38 (1)(a)

> The principal immigration officer must, within 10 working days after the due date for lodging an expression of interest under regulation 8 (4), contact the person who lodged the expression of interest and, if –
>
> (a) The expression of interest meets the requirements in regulation 8, invite the person to apply for permanent residence; or
>
> (b) The expression of interest does not meet the requirements of regulation 8, inform the person of that fact.

[89] A person invited to apply must do so, regulation 10 then requires, by completing an application for approval, paying a fee, and satisfying the regulation 12 criteria 'for grant of permanent residence in own right':

> (1) A person applying for permanent residence under regulation 10 must –
>
> (a) Be aged 18 years or older and be living in the Cook Islands at the time the application is made; and
>
> (b) Provide evidence, acceptable to the principal immigration officer, that the person has a valid permit or is otherwise lawfully entitled to live in the Cook Islands; and
>
> (c) Provide evidence, … , of having completed a values or language programme; and
>
> (d) Provide at least 4 statutory declarations in support of the application including at least 1 from each of the following persons:
>
> (i) An Aronga-mana in the persons village of primary residence:
>
> (ii) An official from a community organisation for which the applicant has completed voluntary service:
>
> (iii) A member of the Cook Islands community who is not an immediate family member or a business associate of the applicant; and
>
> (e) Provide evidence, … , of having completed at least 312 hours of community service in the 5 year period before lodging the application for permanent residence;
>
> …

[90] Where all accepted applications result in a total number of permanent residents in their own right of 500 or less, the application must under reg 14 be referred to the Minister for final decision.

[91] Where that number is exceeded the applications must be ranked, under reg 15; and priority given to those living in the Pa Enua and yet further priority to New Zealand citizens. So here too the challenged preference comes into play.

Conclusions

[92] The evidence of the principal immigration officer is that CIIA 2021 and CIIR 2023 are the outcome of a 2018 review of the then unsatisfactory immigration and residence regime; and the 'overall proposal' was this:

> … there should be a new Act to provide a broad legislative framework, which would be accompanied by a comprehensive set of regulations to prescribe clear criteria and processes for visa and permanent residence applications.

[93] Just as CIIA 2021 passed through the legislative process, furthermore, CIIR 2022, the precursor to CIIR 2023, passed through a parallel public process; and, as the principal officer says, the Parliamentary select committee was given the draft regulations, 'to show how the bill would work in practice, and … the context that the subsidiary legislation provided'.

[94] In principle, it seems to me furthermore, permanent residence accorded in that way is fully compatible with Art 76A, even though, read literally, it requires primary legislation to prescribe qualifications for permanent residence and related matters; a statute like ERDA 1971-72.

[95] But that, of itself, cannot answer the first primary question: whether the challenged New Zealand preference, now conferred by CIIR 2023, validly gives legislative effect in Cook Islands domestic law to the 2001 Joint Centenary Declaration obligation.

[96] In 2001, as I have said, ERDA 1971-72 already answered that obligation. Parliament did not have to consider it. But when Parliament revoked ERDA by CIIA 2021 it needed to decide, for the first time, whether and how to continue to give domestic legislative effect to that obligation.

[97] This was, and is, a question of real significance. The New Zealand preference may be intelligible set, as the 2001 joint declaration says, against the unique constitutional relationship between the two countries and asymmetric shared citizenship. But it engages two constitutional rights: the rights to equal treatment, and not to suffer discrimination.[27]

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[27] Cook Islands Constitution, Art 64.

[98] The select committee may have had the draft regulations. But the treaty obligation was never before Parliament and CIIA 2021says nothing about it. Thus it is open to Friends of Fiji to argue, as it does, that Parliament chose not to endorse the preference; that, indeed, CIIA 2021 nullifies it.

[99] The obligation may now purport to be answered by CIIR 2023. But that is an act of the Executive. As a matter of long settled law, it cannot have effect at domestic law unless expressly authorised by Parliament. Parliament must enact law giving domestic effect to treaty obligations assumed by the Executive; not the Executive.

[100] The result is, I conclude, that the NZ permanent residence preference, expressed in reg 8(2)(d), CIIR 2023, is invalid for that reason firstly; and secondly because, despite the wide power to delegate CIIA 2021 confers, it is beyond the scope of that Act. What CIIA 2021 lacks and needs are attributes like those for which the Civil Aviation Act 200I provides a model.[28]

[101] These conclusions suffice to resolve this application and, I consider, it would be unhelpful and misleading if I were now to attempt to answer the third question.

3: IS THE PRESENT PREFERENCE UNAWFULLY DISCRIMINATORY?

[102] Article 64 of the Constitution guarantees 'Fundamental human rights and freedoms'; and the aspects relevant to this application are these:

> (1) It is hereby recognised and declared that in the Cook Islands there exist, and shall continue to exist, without discrimination by reason of race, national origin, … the following fundamental human rights and freedoms –
>
> (b) The right of the individual to equality before the law and to the protection of the law.
>
> (2) It is hereby recognised and declared that every person has duties to others, and accordingly is the subject in the exercise of his rights and freedoms to such limitations as are imposed, by any enactment or rule of law for the time being in force, for protecting the rights and freedoms of others …

[103] My immediate difficulty in answering this third question, which calls for a ' balancing exercise' under Art 64(2), is that I have already held there is, quite unintentionally, no valid 'enactment' underpinning the NZ residence preference contended to be discriminatory.

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[28] Paras 48-51.

[104] Any analysis I made under proportionality test, therefore, which the Judicial Committee of the Privy Council has confirmed applies in such a case as this,[29] would inevitably be skewed and could well be misleading; and I decline to make that analysis.

CONCLUSION

[105] I grant this application to the extent of the following declaration: the NZ permanent residence preference, expressed in reg 8(2)(d), CIIR 2023, is invalid because: (i) it purports to give effect to a 2001 Joint CI-NZ Centenary Declaration obligation only able to be given domestic legislative effect by Parliament; (ii) it is beyond the scope of CIIA 2021.

[106] Counsel are to file a joint memorandum identifying any consequent remaining issue within 14 days of the issue of this decision.

P J Keane, CJ

[29] *Arorangi Timberland Limited v Minister of the Cook Islands National Superannuation Fund* [2016] UKPC 32.