



SUPREME COURT OF NAURU

IN THE SUPREME COURT OF NAURU
AT YAREN

Miscellaneous Proceedings No 72 of 2015

IN THE MATTER of the Passports Act 2011

AND IN THE MATTER of an Application for
review of the decision of the Minister for
Justice

BETWEEN : ROLAND KUN

APPELLANT

AND : SECRETARY FOR JUSTICE AND BORDER CONTROL

RESPONDENT

Before: Madraiwiwi CJ
For the Applicant: V Clodumar
For the Respondent: GE Leung
Date of Hearing: 22 July 2015
Date of Decision: 17 August 2015

RULING

CATCHWORDS

Application to strike out proceedings – Order 15 & 19 Rules of Civil Procedure 1972. Republic Proceedings Act 1972 – Secretary for Justice wrongly joined – Passports Act 2011 – Minister for Justice appropriate respondent – Implied repeal – Judicial discretion to amend pleadings – Application dismissed.

1. This is an application by summons dated 16 July 2015 made by the respondent Secretary for Justice to strike out these proceedings instituted by the appellant Hon Roland Kun. The application is made pursuant to Order 15 rule 19 (1 and (2) of the Civil Procedure Rules 1972, the Passports Act 2011 (the "Act") and the inherent jurisdiction of the Court on the basis that it discloses no reasonable cause of action against the respondent.

2. The grounds are first that the respondent is not the statutory entity charged with issuing passports under section 6 of the Passports Act 2011 and second, the respondent is not the person who made the decision to cancel the applicant's passport on 18 June 2015. It is not disputed that party is the Minister for Justice.

3. In addition to oral argument by counsel, the respondent filed submissions dated 22 July 2015, the appellant filed a response dated 24 July 2015 and the respondent submitted a further reply dated 27 July 2015.

4. The crux of the respondent's argument hinges on the respondent being incorrectly named as the party against whom relief is being sought, when it is the Minister for Justice who is the appropriate party, being the person who cancelled the applicant's passport as so empowered under the Passports Act.

5. It is the appellant's contention that the respondent has been properly joined pursuant to the Republic Proceedings Act 1972 (the "RPA"). Section 11 (2) of the RPA provides:

"11. (2) Civil proceedings against the Republic shall be instituted against the Secretary for Justice."

6. 'Civil proceedings' is defined in section 2 of the RPA as follows:

" 'civil proceedings' includes proceedings for the recovery of fines or penalties but does not include proceedings of a nature such as in England are taken on the Crown side of the Queen's Bench Division of the High Court of Justice."

7. Subsections (2) and (3) of section (3) of the RPA then amplify the definition of 'civil proceedings' in these terms:

"3. (2) No civil proceedings may be taken against the Republic to enforce a claim against the Republic unless:

- (a) before the commencement of the proceedings, Cabinet has given leave for them to be taken; or
- (b) the claim is of a kind mentioned in subsection (3).

(3) A person may take civil proceedings without the leave of Cabinet, to enforce any of the following claims:

- (a) a claim for the enforcement of a contract reliably entered into by, or on behalf of the republic;
- (b) a claim for judicial review of administrative action;
- (c) a claim to enforce the payment of debt charges which are a charge on the Treasury Fund; or
- (d) a claim in respect of which it is provided in an Act that the provisions of this section do not apply."

8. As the Court has already ruled on 24 June 2015 that the original application for judicial review be vacated and these proceedings continue by way of an appeal under the Act, an appeal would ordinarily have to comply with section 3 (2) (a) of the RPA. The appellant cannot continue to argue this is a judicial review given the earlier decision. It follows that the appellant can not avail himself of

the exemption afforded by section 3 (3) (b). If the RPA applies then these proceedings are by way of a statutory appeal and the consent of Cabinet is required for the institution of this matter. The appellant cannot have it both ways: to argue that the RPA applies and that this is a judicial review and not an appeal.

9. For completeness, it would appear that the exemption from leave of Cabinet extended to judicial review claims in section 3 (3) (b) of the RPA reinforces the interpretation in section 3 (1) that they are not part of the definition of "civil proceedings" in terms of the RPA.

10. That does not dispose of the matter as consideration must now be given to the Passports Act 2011 (the "Act"). Section 6 of the Act provides:

"6. Subject to section 7 and Part 4, the Minister must, on application by a Nauru citizen issue the citizen with an ordinary Nauruan passport."

11. The power to cancel a passport is vested in the Minister by section 24 of the Act which states:

"24. (1) The Minister may cancel a Nauru travel document.

(2) Without limiting subsection (1) the Minister may cancel a Nauru travel document that has been issued to a person if:

(a) the Minister intends to issue another travel document to the person immediately after cancelling the document; or

(b) the document has been lost or stolen; or

(c) the Minister becomes aware of a circumstance that would have permitted the Minister to refuse to issue the document to the person under section 17, 18, 19, 20; or

(d) prescribed circumstances exist in which the document may be cancelled."

12. Section 18 of the Act states:

"18. The Minister may refuse to issue a Nauru travel document to a person if the Minister believes on reasonable grounds that:

(a) if the document were issued to the person, the person would be likely to engage in conduct that might :

(i) prejudice the security of Nauru or a foreign country; or

(ii) endanger the health or physical safety of another person whether in Nauru or a foreign country; or

(iii) constitute a serious offence against this Act; or

(iv) constitute a prescribed serious offence against another Act; and

(v) it is necessary to refuse to issue the document to permit that person from engaging in the conduct."

13. Notice of any reviewable decision is required to be given under section 39 of the Act, the relevant provisions are as follows:

"39. The person who makes a reviewable decision must give each affected person a reason for the decision specifying the following:

(a) the decision;

(b) the reasons for the decision;

(c) ...

(d) if the decision was made by the Minister, that person may appeal to the Supreme Court against the decision within 28 days after receiving the notice."

14. Provision for appeals are set out in section 41 of the Act which provides:

- "41. (1) An affected person for a reviewable decision made by the Minister may appeal against the decision on a point of law to the Supreme Court.
 (2) The notice of appeal must be filed within 28 days after the person receives notice of the decision under section 39.
 (3) The notice of appeal must state fully the grounds on which the appeal is made.
 (4) The appeal does not affect the operation or implementation of the reviewable decision.
 (5) However, the Court may make an order staying or otherwise affecting the operation or implementation of so much of the decision as the Court considers appropriate to effectively hear and decide the appeal.
 (6) To decide the appeal, the Court must:
 (a) affirm the decision; or
 (b) refer the matter back to the Minister with directions to reconsider the whole or any specified part of the matter."

15. The long title to the Act describes it as "An Act to provide for Nauruan passports and travel-related documents and for related purposes." The long title to the RPA states "An Act to make provision relating to the civil liabilities and rights of the Republic to civil proceedings by and against the Republic and relating to the civil liabilities of persons other than the Republic in certain cases involving the affairs and property of the Republic, and for purposes connected with those matters."

16. Relating the RPA to the Act in terms of the Secretary for Justice and the Minister is superficially attractive but bears further consideration upon closer examination. Legal niceties and definitions aside, while the RPA vests in the respondent a representative legal capacity on behalf of the Republic of Nauru and its various *persona* including the President, Cabinet and Ministers it cannot ascribe to the respondent that capacity where a power is not only conferred by statute on a specific person, but it prescribes the procedure for appeal to this Court in respect of decisions made by that person. Section 11 (2) of the RPA simply cannot be prayed in aid of the appellant's cause: not only does it not lend itself to the circumstances of section 41 of the Act, there is no provision in the RPA which authorises the respondent to do so.

17. Sections 24, 18, 39 and 41 of the Act set out a legislative scheme for the cancellation of passports and prescribe the procedure for relief, namely an appeal on a point of law to the Court, which may either affirm the decision or remit the same to the Minister with directions for him to consider.

18. In this regard, the Court accepts the proposition advanced by the respondent that the apparent dissonance between the RPA and the Act can be resolved by the application of the maxim *generalis specialibus non derogant* which was discussed in *Barker v Edgar* in the following terms:

*"When the Legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms."*¹

¹ (1898) NZPCC 122 at 427; [1898] AC 748 at 754

19. Neither the RPA nor the respondent feature in that structure because it appears to have been conceived as an expeditious means of resolving contentious decisions made by the Minister. The 28 day deadline stipulated in sections 39 and 41 of the Act reflect that rationale.

20. The RPA is of general application to civil proceedings instituted by and against the Republic. The Act is a discrete piece of legislation that deals specifically with passports and travel documents. While it is trite law to, as far as practicable, harmonise legislation so as to ensure there is compatibility as Parliament is never assumed to contradict itself, it is evident that the Act was intended as a 'stand alone' statute.

21. That conclusion emerges from the fact that the Act makes no mention of the respondent in the sections referred to in paragraph 15, notwithstanding section 11 (2) of the RPA which mandates that all civil proceedings against the Republic are to be instituted against the respondent. A literal reading of section 41 of the Act clearly suggests any appeal lies against the Minister and not the respondent. To invoke the RPA in this context would appear to be misconceived and an error of judgment because a statutory appeal under the Act is a different species from that contemplated by the RPA which are begun either by writ or originating summons.

22. There is an immensely practical aspect to this arrangement. The authority for the cancellation of a passport and against whom an appeal is made to this Court, and in respect of whose decision the Court may either affirm or remit the decision with particular directions as the case may be, is the Minister. While the respondent is the appropriate party in proceedings under the RPA, he is not the correct party for these proceedings under the Act. A basic principle for a joinder was stated by Devlin J in *Amon v Raphael Tuck*²:

"The only reason which makes it necessary to make a person a party to an action is that so he should be bound by the result of his action, and the question to be settled therefore must be a question which cannot be effectually and completely settled unless he is a party."

Those dicta cogently articulate the reasons why it is the Minister rather than the respondent who should be joined as a party.

23. In this regard, the Court also adopts the respondent's contention that those provisions taken *in toto* have impliedly repealed the RPA which therefore has no application to the Act. The principle is expressed in *Halsburys Laws of England* as follows:

"To the extent that the continued application of a general enactment to a particular case is inconsistent with special provisions subsequently made as respects that case, the general enactment is overridden by the particular, the effect of the latter being to exempt the case in question from the operation of the general enactment or, in other words, to repeal the general enactment in relation to that case."³

24. As has become readily apparent, the appellant ought to have instituted these proceedings against the Minister for Justice rather than the respondent.

25. The respondent has persuasively put the case for dismissing these proceedings in their entirety and he has considerable merit in his favour in light of the various missteps the appellant has committed, including proceeding initially by way of judicial review. The appellant seeks the further

² [1956] 1 QB 357 at 380

³ (3^d Ed) para 712

indulgence of the Court while omitting to have sought leave for the proposed Amended Notice of Appeal which has been filed regardless.

26. The ruling delivered on 24 June 2015 provided ample opportunity for the appellant to regularise these proceedings in accordance with section 41 of the Act. That has not been done. Instead the appellant invokes the residual powers of the Court under Order 15 r 19 (1) (a) which allows for amendment as well as striking out. However, the character of legal proceedings under the system inherited from the English common law tradition was summarised by Lord Diplock in *Allen v Sir Alfred McAlpine & Sons Ltd* in these terms:

*"The procedure of the English courts is based on the adversary system. The underlying principle of civil litigation is that the court takes no action in it on its own motion but only on the application of one or other of the parties to the litigation, the assumption being that each will be regardful of his own interest and take whatever procedural steps are necessary to advance his cause."*⁴

27. Although the Court is sympathetic to the arguments pressed by the respondent, it also gives some weight to the concession made at paragraph 37 of its initial submissions dated 22 July 2015 that the proposed Amended Notice of Appeal be struck out in lieu of the summary dismissal of the entire proceedings under Order 15 r 19 (1) (a). It is the reason that the Court has not adopted the firm position taken in *Rodney Henshaw v Secretary for Justice*⁵ where it dismissed an application for judicial review for failing to comply with procedural statutory requirements.

28. This more nuanced approach accords with the sentiments expressed by the Lord Chief Baron of the Court of Exchequer in *Deare v The Attorney General* wherein his Lordship stated:

*"It has been the practice which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of justice, where any real point of difficulty that requires judicial decision has occurred."*⁶

The Court is also conscious of the fact that were these proceedings to be struck out *in toto* the appellant would be left with no avenue for redress, the 28 day window to appeal having expired.

29. Accordingly while the appeal remains on foot, the proposed Amended Notice of Appeal is struck out and the Appellant is to make a proper application to amend the Notice of Appeal and join the Minister as the appropriate respondent. Costs are in the cause.

DATED this 17th day of August 2015

Joni Madraiwiwi

Chief Justice
SUPREME COURT OF NAURU

⁴ *Allen v Sir Alfred Mc Alpine & Sons Ltd* [1968] All ER 543 at 552, 553

⁵ Miscellaneous Proceedings No 56 of 2015 (24 July 2015)

⁶ (1835) 160 ER 80 at 85