IN THE SUPREME COURT OF NAURU

Miscellaneous No 83 of 2016
Inthe matter of the Passport Act 2011

BETWEEN

Mathew Batisua APPELLANT

AND

Minister for Justice and Border Control RESPONDENT

Before: Khan, J
Date of Hearing: 13 December 2017
Date of Judgement: 8 February 2018

Case may be cited as: *Batisua v Minister for Justice& Border Control*

CATCHWORDS:

Where s.41 of the Passport Act 2011 was repealed by s.6 of the Passport (Amendment Act) 2016 giving the powers to the President to hear the appeal instead of the Supreme Court – whether the appellant's right to file the appeal survived the amendment under the provisions of s.28 of the Interpretation Act 2011.
Held: that with the repeal of s.41 of the Passport Act 2011 the Supreme Court did not have jurisdiction to hear the appeal.

APPEARANCES:

Counsel for the Appellant: Mr V Clodumar (pleader)

Counsel for the Respondent: J Udit, Solicitor General

RULING

INTRODUCTION

1. On 25 April 2014 the appellant was issued with a Nauruan Passport No 016728 with the expiry date of 24 April 2019. The appellant is a citizen of Nauru.

2. The appellant and others were charged with the offence of unlawful assembly and other offences in June 2015 commonly known as 'riot case' which allegedly took place in the precincts of the Parliament.

3. On or about 27 August 2016 the Minister for Justice and Border Control, Mr. David Adeang (Minister) cancelled the appellant's passport pursuant to the provisions of s.38 of the Passport Act 2011 (the Act).

4. Under s.39(2) of the Act it is provided that if the decision is made by the Minister then the person whose passport is cancelled may appeal to the Supreme Court against the Minister's decision within 28 days after receiving the notice of cancellation. The appeal against the decision of the Minister is to be made under s.41 of the Act which provides:

   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 affected 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.

NOTICE OF APPEAL

5. The appellant filed notice of appeal on 13 September 2016 against the decision of the Minister to cancel his passport.

6. According to the affidavit of service, the notice of appeal appeal was served on the Minister on 14 September 2016, however, the respondent disputes that he was served on the alleged date and therefore no appearance was entered on his behalf.

7. In September 2016 the Act was amended by Passports (Amendment) Act (Amended Act)[1] and was certified by the Speaker on 8 September 2016. Section 6 of the Amended Act repealed section 41 of the Act. Section 6 provides:

Section 41 of the Act is repealed and substituted with the following:

1) An affected person for a reviewable decision made by the Minister may appeal the decision to the President.

2) An appeal to the President must:

a) be in writing;

b) set out the reasons for the appeal; and

c) be lodged within 28 days of the receipt of the Notice under section 39.

3) The appeal does not affect the operation or implementation of the reviewable decision.

4) In considering the appeal, the President may affirm, vary or set aside the decision.

5) A decision made by the President under subsection (4) is final and conclusive.

6) Any decision made for the reasons prescribed under section 24(2)(c)(i) is non-justicable.

8. As no appearance was entered on behalf of the respondent, the appellant filed a summons under Order 50 Rule 8 of the Civil Procedure Rules 1972 to enter default judgment against the respondent. (I shall address the appropriateness or otherwise of this application later.)

APPLICATION

9. On 14 July 2017 the respondent filed an application under Order 15 Rule 19 of the Civil Procedure Rules 1972, s.41 of the Act and the inherent jurisdiction of this court for an order that the action/appeal to be struck out as it disclosed no reasonable cause of action or otherwise is an abuse of process of the court.

SUBMISSIONS

10. After the filing of the application under Order 15 Rule 19 both counsels filed written submissions. The respondent's submission was essentially that with the amendment of the Act this court's jurisdiction to hear the appeal was revoked and as such this Court did not have the powers/jurisdiction to hear the appeal; and the appellant accepted that s.41 of the Act was repealed by s.6 of the Amended Act but the

[1] (No. 46 of 2016)

appellant submits that he still had a right to file the appeal by virtue of the provisions s.28 of the Interpretation Act 2011. S.28 of the Interpretation Act provides:

1) The repeal or amendment of a written law does not:

   a) revive anything not in force or existing at the time the repeal or amendment takes effect; or

   b) affect the previous operation of the repealed or amended law, anything done, begun or suffered under the repealed or amended law; or

   c) Affect an existing right, privilege, obligation or liability acquired, accrued or incurred under the repeal or the amended law; or

   d) affect a penalty, forfeiture or punishment incurred under the repealed or amended law.

2) An investigation, procedure or remedy in relation to anything mentioned in subsection (i)(c) or (d) may be started, continued or enforced as if the repealed or amended law had not been repealed or amended.

The appellant contends that:

> [14] It is very clear from the above that the appellant's right to appeal survived the amendment to the Act as he accrued his right at the time the decision was made to cancel his passport. The fact that he filed his appeal after 8 September was irrelevant. Thus the appellant submits that he has a cause of action against the respondent[2].

FURTHER SUBMISSIONS

11. I invited further submissions on the implications of s.28(2) of the Interpretation Act 2011 and the appellant submitted at [5][3] as follows:

> [5] It is the appellant's argument that the relevant time that the right of the appellant to appeal accrued, to whom and the time limit to appeal was 27 August 2016. Unless there is explicit language in the amendment Act as to retrospective effect of the amendment, which there were none, then the right to appeal and the processes were 'preserved' by section 28(2) of the Interpretation Act 2011 at the relevant time as if the amendment of the Act had not been made. That is, not only the right to appeal was preserved but the proceedings under section 41 at the relevant time was preserved by section 28(1)(c) and section 2 of the Interpretation Act respectively.

[2] Appellant's written submissions [14] dated 7 September 2017

[3] Appellant's written submissions dated 18 September 2017

ISSUES FOR DETERMINATION

12. The issue for determination is whether s.6 of the Amended Act in repealing s.41 of the Act vested the appeal powers in the President; or whether by virtue of s.28(2) the appellant still had the right of appeal to this court; effectively whether this court has jurisdiction to hea this appeal.

CONSIDERATION

13. The respondent submits at [4], [7] and [9][4] as follows:

[4] To begin with, section 19 of the Interpretation Act provides that an 'act commences:

a) On certification; or

b) if the Act provides for another date of commencement – on the other date.'

[7] When sections 28 and 30 of the Interpretation Act are read in conjunction with Part 4 of the Passports Act, it is submitted that the primary objective of the provision is the 'accrued right'. With due respect, it is submitted that the right of appeal was not amended or repealed. What is the effect of it?

[9] The intent and purpose of making laws by Parliament remains the guiding principle for the construction of statutes. In *Hutchinson v Jauncey* [1950] 1 All ER 165 at page 168 (B) Sir Raymond Evershed M.R said:

"It seems to me that, if the necessary intendment of the Act is to affect pending causes of action, the Court will give effect to the intention of the legislature even though there is no express reference to pending actions."

WHEN DOES THE RIGHT ACCRUE?

14. On the issue of when does the right accrue the respondent relies on:

i) *Abbott v Minister for Lands*[5]where the Privy Council stated at page 431 as follows:

"It is has been very common in the case of repealing statutes to save all rights accrued. If it were held that the effect of this was to leave it open to anyone who could have taken advantage of any of the repealed enactments still to take advantage of them, the result would be very far reaching.

It may be, as Windeyer, J observes, that the power to take advantage of an enactment may without impropriety be termed a 'right' but the question is whether it is 'a right accrued within the meaning of the enactment which has to be construed'.

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[4] Respondent's written submissions dated 29 November 2017

[5] [1895] AC 425

Their Lordships think not .... They think that the mere right (assuming it to be properly so called) existing in the members of the community or class of them, to take advantage of an enactment, without an act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' within the meaning of the enactment."

ii) *Continental Liqueurs Pty Ltd v G.F. Heublein and Bro. Inc*[6] where the High Court of Australia stated at page 426 as follows:

"If the application had not been pending in the Court when the new Act came into force, I should have agreed that the applicant company had not a right to relief under s.72 which it could therefore enforce. Even though it had a locus standi to apply under the section as a 'person aggrieved', s.8 of the Acts Interpretation Act could have no application in its favour: see Abbott v Minister for Lands (1) *and cf* Brandon's Patent Acts Ex parte (Doty 2). *But in my opinion the applicant, by instituting its application in the Court, that is to say by filing its notice of motion, acquired a right to have the Court decide whether it ought to exercise its jurisdiction under s.72 in that application, and that right was within the protection of s.8(c) of the Acts Interpretation Act: cf.* Colonial Sugar Refining Company Limited v Irving (3). *The principle of Abbott v Minister for Lands (4) is expressed in the sentence:*

"...the mere right (assuming it be properly so called) existing in the members of the community of any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a 'right accrued' ...."

(1) The filing of the motion in the present case was an act done by an individual towards availing himself of the right to have an order made for the removal of the mark from the register: cf. In *In re A Debtor Ex Parte Debtor (2).* There is nothing in the 1955 Act to displace the general rule of common law which the Acts Interpretation Act reinforces, namely that, in general, when the law is altered during the pendency of an action the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights: 10th Ed (1953) p.221, *Hutchinson v Jauncey (No. 3).* Accordingly, I am of the opinion that the appeal of the former s.72 the Trades Marks Act 1955 (Cth) does not affect this application, and that the application must now be dealt with as if that section were still in force.

iii) Re *Foodlands Associated Limited v John Weeks Pty Ltd*[7] the Federal Court of Australia stated:

[1] The applicant seeks to have a decision of the Registrar of the Trade Marks reviewed by this Court. A preliminary question has arisen as to whether the Court has received jurisdiction pursuant to the jurisdictions

[6] [1959 – 1960] CLR 422

[7] [1988] FCA 106 (15 April 1988)

of the Courts (Miscellaneous Amendments) Act 1987 to review a decision made upon an application to the Registrar commenced in October 1985. Both the applicant and respondent contend that the Court has jurisdiction.

[2] On 25 October 1985 the applicant applied to the Registrar of Trade Marks for the removal of the respondent's registered trademark from the Registrar of Trade Marks in respect of all the services in respect of which it was registered insofar as the State of Western Australia was concerned.

[3] The application was heard by the Chief Assistant Registrar of Trade Marks on 11September 1987. Her decision, which stands as the decision of the Registrar, was published on 16 December 1987.

[7] Where an enactment introduces new procedural provisions, such provisionswill apply to the pending actions unless a contrary intention is clearly expressed or implied – see *Gardner v Lucas* (1878) 3 App.Cas 582, 603 (HL); *Quilter v Mapleson* (1882) 9 QBB 672; *Attorney General v Vernazza*(1960) AC 965; *Maxwell v Murphy* [1957] HCA 7; (1956–7) 96 CLR 261.

[15] There was a clear legislative intention that if the jurisdiction of the Supreme Court had been activated already by the commencement of a proceeding, it would be preserved as far as was necessary to allow that Court to complete that pending matter or matters. If the potential jurisdiction of the Supreme Court had not been utilised before 1 September 1987 by the commencement of the proceedings in that Court, that potential jurisdiction would be replaced by the jurisdiction of the Federal Court see *Total (Australia) Limited v The Registrar of Companies* [1969] VICRP 104; (1969) VR 821.

[18] Having been requested by the parties to determine this matter as a preliminary question, I hold that this Court has jurisdiction to hear this 'appeal' and have exclusive jurisdiction in that regard.

CONCLUSION

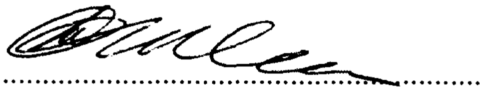
15. The notice of appeal was filed after the amendment of the Act and at that material time the jurisdiction of this court to hear the appeal was revoked and this court did not have jurisdiction to hear the appeal. I find that the appeal was filed without any legal basis and the respondent's application to strike out the action under Order 15 Rule 19 of the Civil Procedure Rules is granted and the action is struck out.

16. I had mentioned earlier that I will comment on the appellant's application to enter default judgment under Order 50 Rule 8[8]. Order 50 Rule 8 is to enable a plaintiff to move the court to enter a default judgment in a civil case filed against the Republic in

[8] Civil Procedure Rules 1972

a civil action. This was not a civil action and Order 50 Rule 8 application in my view was not applicable. If the respondent had not entered an appearance after being served with the appeal, the appellant was at liberty to have the appeal heard in the absence of the respondent and obtain appropriate orders under the Act if the amendment had not taken place.

Dated this 9 day of February 2018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Mohammed Shafiullah Khan
Judge