Lapa & Others v The Kingdom of Tonga

Supreme Court, Nuku'alofa
Webster J.
Civil case No. 8/1990

21, 22 June, 6 September 1990

Births, Deaths and Marriages Registration - cancellation of registration - principles applicable.

The applicants sought a declaration that the registration of the birth of the father of the first applicant in Tonga in 1904, which was made in 1963, was invalid and should be cancelled on the ground that it was wrong in fact and in law.

HELD, dismissing the application,

1. In the absence of any express provision in the Births Deaths and Marriages Registration Act (Cap 42) as to the powers of the Supreme Court to cancel registration of birth, the court should apply principles which had been adopted with regard to registration of land and of companies and with regard to rectification of instruments; and should cancel an entry in the register of births if it were made on a wrong principle, under a clear mistake, as a result of fraud, or if the justice of the case demands it.
2. The facts that the registration had been made on the basis of an affidavit containing hearsay, that that evidence was not corroborated, and that the application for registration was made many years after the birth, did not indicate any wrong principle;
3. It was clearly proved that the date recorded in the register as the date of registration, i.e. 30.4.1908, was incorrect, but it was not clearly proved that there was an error as to the date recorded as the date of birth;
4. Fraud was not alleged, and the justice of the case did not demand that the registration be cancelled since the evidence before the court indicated that the father of the first applicant was born in Tonga in 1904 as recorded in the register.

Statutes considered : Births Deaths and Marriages Registration Act (Cap. 42)
Cases considered :
Ma'asi v 'Akau'ola (1956) 2 Tongan L. R. 107
Hema v Hema (1959) 2 Tonga L. R. 126
To'ofohe v Minister of Lands (1958) 2 Tongan L. R. 157
R v Deputy Industrial Relations Commissioner, ex parte Moore [1965] 1 All E. R. 81

Counsel for the applicants : Mr W. C. Edwards and Mrs F. Vaihu
Counsel for the respondents : Mr K. Whitcombe

Judgment

Preliminary

This is an application by Jone Hiki Lapa for a declaration that the registration in Tonga of the birth of his father, the late Ela Lapa, was wrong in fact and in law; and for an order directing the cancellation of that registration.

The Respondent denies that and asks for a declaration that the registration is correct in fact and law.

The judge reviewed the evidence, and continued:

Submissions

Counsel for the Applicants, Mr Edwards, submitted that the registration of Ela Lapa's birth in May 1908 was incorrect because it was based on an affidavit made in 1963; that the affidavit was hearsay; and that no corroboration had been produced. Mr Edwards further submitted that, as the actual date of registration in the Tongan Register was stated to be 30th April 1908, the registration was incorrect. Nor was there any power under the Births, Deaths & Marriages Registration Act (Cap. 61 - "the Registration Act") for the sub-registrar to accept late registration. In addition, under the Treaty of Friendship between Great Britain and Tonga, Article VII (3) (The Law of Tonga 1967 Vol. III p. 1984) registration in Tonga of the births of subjects of Her Britannic Majesty was to be done by the British Commissioner and Consul. The date of birth was admitted but the place of birth at Kolofo'ou, Nuku'alofa was contested in view of a Birth Certificate from the Registrar of Births, Deaths and Marriages of Niue stating that Ela was born at Avatele, Niue. Mr Edwards submitted that there was no clear evidence that Ela Lapa had been born in Tonga.

Counsel for the Respondent, Mr Whitcombe, submitted in reply that it was obvious from the surrounding circumstances that the actual date of registration was recorded as 30th April 1908 as a result of a clerical error which should not affect the presumed genuineness of the document. The Registration Act imposed time limits and penalties on those who who had to register births but there was nothing in the Act preventing the sub-registrar from accepting registration after the specified time. Unders 3(4) of the Act the registration in 1963 might even be within the specified time limits. The Court had not been referred to any legislation made under Article VII (3) of the Treaty of Friendship and there was nothing in the Act to show that non-Tongans were not to be registered under it. He conceded that the affidavit in 1963 was hearsay but submitted that it came within the exception in section 89(j) of the Evidence Act for statements on relationships by blood or marriage which had to be interpreted in light of the English position (Phipson on Evidence (13th Ed) para 24 - 54 and Halsbury's Laws (4th Ed) Vol. 17 para. 82). In any event the sub-registrar was acting in an administrative and not a judicial capacity and was not bound by the formal rules of evidence: in the absence of other information he was entitled to accept and act on the information presented to him. Apart from the affidavit, other evidence available to the Court was that Ela's sister Pule was born in Tonga in 1907; when Ela registered the births of 2 of his children, the Applicant in 1934 and his brother Hetau in 1940, Ela believed that he had been born in Tonga; and there was no evidence that Ela had questioned the registration

of his own birth in Tonga in 1963. Kui Tasila's evidence was uncertain and if he was correct Ela would have been around 15 when he arrived in Tonga and would have had a clear recollection of living somewhere else previously. There had been no application to correct or amend the registration until these proceedings had been taken. In contrast to the Tongan position, the Niue registration was incomplete in many respects, including the information on which it was based, and nothing was known of it until 1985.

Principles on which registration may be cancelled

While there were no submissions on the question, it is important first to consider the principles on which the Court should act in deciding whether the registration should be cancelled. There is nothing about this in the Registration Act, so it may help to look at other fields of law.

In the case of registration of land in Tonga under the Land Act, in *Ma'asi v 'Akau'ola (1956) 2 T.L.R. 107* the Land Court decided an entry in the Land Register was conclusive unless shown to have been made by mistake or fraud (which latter had to be strictly proved). Rectification for error was also allowed in *Hema v Hema [1959] 2 T.L.R. 126. In To'ofohe v Minister of Lands [1958] 2 T.L.R 157* the Privy Council said that a grant of an allotment would not be set aside unless made on wrong principles. These follow the position under English law *(Halsbury Vol. 26 para 1054).*

In the case of registration of companies, the court must inquire into all the circumstances and consider what equity an applicant has to call on, but should allow rectification if satisfied of the justice of the case *(Halsbury Vol. 7 paras 1238, 308 n 3 and 237 n 2).*

In the law of mistake, rectification of an instrument will be granted if the evidence is clear and unambiguous that there was a mutual or common mistake *(Halsbury Vol. 32 paras 50, 56).*

There are no relevant provisions in either the Evidence Act or the Interpretation Act.

Therefore the principles on which the Court will act in this case are that the registration will not be corrected or cancelled unless the Applicants have shown that it was made -

(a) on wrong principles;

(b) under a mistake or error (proved clearly and unambiguously);

(c) as a result of fraud (proved strictly) - but that is not alleged here; or

(d) in circumstances where the justice of the case demands it.

Registration on wrong principles

Registration based on affidavit made in 1963

While it is certainly unusual for a birth in 1908 to be registered in 1963 as a result of an affidavit made in 1963, there is nothing fundamentally wrong in this. Indeed it would have been strange if registration in 1963 had been made relying on an affidavit which was not up-to-date. As the parents of Ela were by then dead, his elder sister Pule was the natural person to make the affidavit and provide the information. On the same day she registered her own birth and although she is still alive neither she nor anyone else has attempted to challenge that registration.

Nor can anything be made of the affidavit made in 1963 being liable to be inaccurate in relation to events in 1908. That may be so, but at the time registration was applied for it was the most accurate information available to the sub-registrar. Even now, little more accurate information is before the Court.

Insufficient evidence due to hearsay

The Registrar General and sub-registrars are acting administratively and not judicially when making registrations: if authority is needed for this statement see e.g. *Dinizulu v Attorney-General and Registrar-General [1958] 3 All E.R. 555 (QBD); R v Registrar General ex parte Segerdal and another [1970] 3 All E.R. 886 (CA)* and also *R v Deputy Industrial Injuries Commissioner ex parte Moore [1965] 1 All E.R. 81 (CA)* where Diplock LJ said *(p. 93A)* -

> ".... all claims to benefit shall be submitted to an insurance officer, a civil servant appointed by the Minister. His duties are administrative only; he exercises no quasi-judicial functions for there is, at this stage, no other person between whose contentions and those of the claimant he can adjudicate. He must form his own opinion as to the validity of the claim, and for this purpose he may make whatever inquiries he thinks fit."

The sub-registrar was not therefore bound by the rules of evidence *(Halsbury Vol. 17 para. 2)* and in any event the Evidence Act applies to proceedings in courts and not to officials carrying out administrative acts. In *Board of Education v Rice [1911-13] All E.R. Rep. 36 (HL) Lord Chancellor Loreburn said (p. 38)* -

> ".... what comes up for determination is a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and listen fairly to both sides, for that is a duty lying upon everyone who decides anything. But I do not think that they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way that they think best, always giving a fair opportunity to those who are parties in the controversy of correcting or contradicting any relevant statement prejudicial to their view."

Returning to Diplock LJ in *ex parte Moore*, he amplified this *(p. 94A)* as follows in a well known passage –

> "The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than that it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer; but he may take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue."

This was cited with approval in *Miller v Minister of Housing* [1968] 2 All E.R. 633 (CA) and applied in *R v Hull Prison Board of Visitors, ex parte St Germain & Ors. (No. 2) [1979] 3 All E.R. 545 (Q.B.D.).*

Looking at the particular position, there is nothing in the Registration Act to indicate that the sub-registrar can only register births on evidence that would be admissible in court, nor do the Registrar General's Regulations even now indicate this (though only made in 1979). The Act has the long title "An Act to regulate the registration of marriages, births and deaths ...." and looking at the relevant sections shows that its purpose is to provide for more efficient registration in the public interest and not to discourage registration of births or to penalise children whose births are not registered (on which see also *Ex parte Koli and Others [1940] I T.L.R. 33*).

In any event the Registration Act was not enacted until 1926, long after Ela's birth, but it is clear from looking at the Register that births were regularly registered even prior to 1908.

For all these reasons I therefore do not accept that a sub-registrar is bound by the formal rules of evidence. He was correct to take into account material such as Pule's affidavit with some probative value and attach due weight to it. In the absence of other material to the contrary - and there has been no evidence that other material was presented to the sub-registrar in 1963 - he was entitled, if not bound, to register Ela's birth accordingly.

In any case Mr Edwards' argument seemed to be that Pule was under one year old at the time of Ela's birth and could not have had knowledge of it: that does not necessarily make it hearsay, but merely indirect evidence under section 61 of the Evidence Act. The only part of the affidavit that was hearsay in terms of section 88 ("evidence of an oral or written statement made by any person not called as a witness") was Pule's statement as to her father's record of Ela's date and place of birth.

As to the rest of the affidavit, Pule must have had direct knowledge of growing up with Ela and similarities of character, temperament or looks that would enable her to speak at first hand of their bblood relationship. More importantly in relation to this case, she could speak to Ela being younger than she was to corroborate his date and place of birth. If she herself had been born in Tonga it was unlikely that the family would have returned to Niue before Ela was born.

In light of the sub registrar's power to take into account all relevant evidence I do not propose to consider further whether Pule's affidavit came within the exception in section 89 (j) of the Evidence Act and the submissions I heard on that point, except to say that I am not convinced that the part of the affidavit which was hearsay would have come within the exception if the formal rules of evidence had applied.

No corroboration of the affidavit was produced for registration

I do not consider that this is a separate ground. There is nothing in the Registration Act requiring the sub-registrar to have more than one informant, even although it may be normal practice with current births for a medical certificate to be required. Even if the rules of evidence apply, by section 127 of the Evidence Act no particular number of witnesses are required for the proof of any fact. In

the special circumstances of this case the sub-registrar was entitled to act on the information available to him.

No power for sub-registrar to accept late registration

It was not in dispute that under the Registration Act the parents of a child were under a duty to register the birth within three weeks (section 3(2)). But there is nothing in the Act stating that the sub-registrar is not to register births out of time. As it happens the Act is also silent on the duty of the sub-registrar to register births, but that is implied from the Act as a whole and section 2 in particular. Section 17 of the Interpretation Act provides that unless the contrary appears to be intended a duty is to be performed from time to time as occasion requires. It would be quite against the purpose of the Act and very unfair to a child if, through the fault of the parents and no fault of him or her, registration was refused simply because it was out of time. The law would be ridiculous if it was administered in this way (and see again Ex parte Koli and Others). Late registration by a sub-registrar is not unlawful even if it is an offence for the parents to be late.

It is clear from the Register of Births for Tongatapu for 1907 to 1917 produced to the Court that late registration has frequently been allowed, even into the 1970s. This was very reasonable given that registration was not compulsory until 1926 and that Government administration in Tonga and the idea of recording events in writing were not developed when Ela was born in 1908.

However I do not consider that, as Mr Whitcombe submitted, section 3(4) applies here. Even if, when Pule made her affidavit in 1963, it appeared to the sub-registrar that information of Ela's birth had not been given, there was then no person alive liable under section 3 to give information. So section 3(4) did not come into operation.

No power for sub-registrar to accept registration of Niuean person

Article VII (3) of the Treaty of Friendship between Great Britain and Tonga *(The Law of Tonga 1967 Vol. III p. 1984)* states -

> "(3) Her Britannic Majesty shall have jurisdiction to make laws providing for the registration in Tonga by the British Commissioner and Consul of births and deaths of subjects of Her Britannic Majesty."

It was clear from the birth registration certificates produced to the Court of the Applicant, his brother Hetau and his children Vaisio'ata, Fekita and Ikusifa that the British Commissioner did accept registrations of their births. This was presumably on the basis that they are Niueans and not Tongans, although Niue is not mentioned on any of the 5 certificates. I was advised that Niue was annexed by New Zealand in 1901 and it appears that accordingly Niueans were regarded as "subjects of Her Britannic Majesty", though no evidence was led about that. However I believe these certificates speak for themselves on this point.

I was not referred to any law made under Article VII (3) and I note that it does not lay any duty on Her Britannic Majesty to make such laws, but merely gives Her the jurisdiction to do so for Tonga.

Nor is there anything in the Registration Act restricting it in any way to dealing with Tongan subjects only. Even if there had been British legislation under Article VII (3), there is no reason why dual registration should not have taken place. Of

itself registration does not grant or establish nationality. Pule's affidavit of 30th April 1963 concerning her own birth makes it clear that she and Ela were Niueans and not Tongans, so there was no question of the sub-registrar being deceived about their nationality.

Therefore Article VII (3) did not prevent registration of Ela's birth.

Registration made under a mistake or error

Error in date of registration

It is manifest from the date and content of Pule's two affidavits dated 30th April 1963 that the date inscribed in the actual Register for registration of Ela's birth on "30.4.1908" is wrong as a result of a clerical error. What was intended was "30.4.1963", as is written as the date of registration of Pule's own birth. Ela was not born in April 1908 so his birth cannot have been registered then. It has been shown clearly and unambiguously that this was an error. But that does not invalidate the whole registration. The Register could have been altered at any time on the written authority of the Registrar General under Regulation 8 of the Registrar General's Regulations. The Court will correct the date of registration to 30th April, 1963.

Error in that Ela not born in Tonga

Having disposed of the peripheral points, I come to the heart of this case: whether Ela was born at Halafo'ou, Kolofo'ou, Nuku'alofa or at Avatele, Niue.

For the registration in Tonga to be corrected or cancelled it must be proved clearly and unambiguously that the sub-registrar was mistaken in believing that Ela was born in Tonga. Until that is done it is right that the Tongan registration should stand. The burden of proving clearly and unambiguously that there was a mistake lies on the Applicant and the standard is on the balance of probabilities.

The factors which may possibly show that the Tongan registration was mistaken are not strong. They are –

(a) Kui Tasila's evidence

Kui is aged 76 and his evidence was fairly confused. He did not readily remember swearing an affidavit about this matter in 1986 *(Exh. 3)* and the dates he gave in evidence for his own birth and his coming to Tonga were different from those in the affidavit So unfortunately his evidence is not at all reliable and does not help the Applicant.

But even if I ignore details such as dates, the main thrust of his evidence, both in Court and in his earlier affidavit, was that he was already here in Tonga when Ela Lapa arrived and that Ela was a young man or grown up when he came to Tonga. Even if I were to accept that, which I cannot, while on the face of it that would help the Applicant in indicating that Ela was not born in Tonga, it would also mean that Ela would have known all along - because he was old enough to know when he came to Tonga - that he had been born outside Tonga and probably in Niue. This runs counter to the evidence of Ela's own belief referred to below.

(b) the Niue birth registration

In 1985, Mrs Mele Tu'ipulotu, a Tongan lawyer, wrote to the Registrar-General of Niue for Ela Lapa's birth certificate, giving as many details of his background and family as she could. The following month the Deputy Registrar in Niue sent

her a certificate dated 23rd May, 1985 containing the following information for Ela Lapa -

Born on 19th May 1908 at Avatele, Niue: Sex – Male;

Father – Lapa, residence Avatele, Niuean;

Mother – Fane, residence Avatele, Niuean.

All the other spaces on the certificate were marked "Not stated", including who the informant was and the date of registration. The items "Entry No" and "Volume No" were also blank. In his accompanying letter dated 29th May the Deputy Registrar stated that compulsory registration only started in 1916 and prior to that all records had been kept by missionaries. Subsequently when Mr Edgar Tu'inukuafe of the Pacific Islanders Educational Resource Centre in Auckland wrote to the Registrar at Niue concerning verification of Ela's birth certificate, the Registrar refused to issue a sworn statement in support of the certificate as it had been certified by the Deputy Registrar as a true copy from their records.

However as neither the Registrar nor the Deputy Registrar of Niue have given evidence in this Court, I cannot do more than look at the actual birth certificate from Niue, lacking as it does the identity of the informant and the date of registration.

In contrast to the information about the Tongan position before the Court, the mere existence of this certificate from Niue is not sufficient to prove clearly and unambiguously that the Tongan registration was a mistake. It has also to be noted that the Niue certificate was not issued until long after Ela's death in 1974. Taken with the scantiness of the information before this Court about the background of the Niue registration, this cannot help the Applicant's case.

The mere existence of the Niuean certificate may raise some doubts about the Tongan certificate, but in light of the other strong evidence mentioned below it is not enough to disturb the Tongan registration.

Just because there is a parallel birth registration in Niue, without a great deal more information about that, including sight of the original records there, it would be quite wrong of this Court to upset the Tongan registration which has stood for almost 30 years, especially to do so now after Ela's death.

In contrast there are the following factors supporting the Tongan registration

(i) Pule's affidavits

The two affidavits were made by Pule in 1963 for the purpose of the registration, when she appeared before the sub-registrar and signed the Register. These stated that she knew from her parents; record that both she and Ela were born in Kolofo'ou and stated that they were sister and brother. An affidavit by Pule dated 12th October, 1988 was included in the Applicant's documents but not formally produced to the Court but I cannot consider this as Pule is still alive in Auckland and no other attempt was made to call her as a witness or obtain her evidence under cross examination. In particular I am not prepared to accept affidavit evidence which amounts to Pule saying that her previous affidavits were wrong;

(ii) Pule's own birth registration

Pule has never challenged this, although she is still alive and able to do so. If Ela's birth was wrongly registered as being in Tonga, then Pule's birth registration

in Tonga the previous year was almost bound to be wrong and one would have expected her to make a similar application to this one. It is most unlikely that their parents would have moved to Tonga, where Pule was born in 1907, then returned to Niue in 1908 for Ela's birth and later returned again to Tonga. While not mentioned in submissions, her own name Pule-ki-Fanga is a very Tongan name, meaning head or boss to the beach, which would also tie in very much with the site of the Niuean settlement on the lagoon beach at Halafo'ou.

(iii) Ela's own belief

The two birth certificates produced to the Court for Ela's own sons, the Applicants Jone and Hetau, are very significant. Both were issued from the Western Pacific High Commission Register of births and in each the informant was Ela himself. In each Ela's own particulars include the statement that his birthplace was Halafo'ou, Tonga. In one his occupation is given as planter and in the other as club steward, so the particulars were completed consciously and one was not merely a copy of the other. These are evidence that in 1934 and 1940 Ela believed that he had been born in Tonga. But they go further than that: in making these registrations with the British Commissioner as opposed to the Tongan Registrar, Ela must have done so because he believed that he and his sons were Niueans and not Tongans, but even so he still believed that he had been born in Tonga and not Niue.

(iv) No challenge from Ela

There was no evidence before the Court that Ela had objected to the registration of his birth in Tonga in 1963 or in the following years up to his death in 1974. So the inference is that he accepted that the Tongan registration was correct.

(v) No evidence from Ela's family

There was no evidence from Pule, and nor was there any evidence from the Applicant Jone or the many other children or grandchildren of Ela, about Ela's or Pule's knowledge of their place of birth. Such evidence of their knowledge or state of mind could have been admissible under section 89(e) of the Evidence Act. The inference has to be that Ela never told his family that he was born in Niue as claimed in Paragraph 9 of the Statement of Claim.

Considering all these factors together, the net result is that it is very clear that there is insufficient evidence to show that the Tongan registration was in error because Ela was in reality born in Niue. Indeed all the factors point to Ela Lapa having been born in Tonga and support the Tongan registration, except for the Niue registration, on which insufficient background has been presented to this court. Justice demanding correction or cancellation.

In view of the finding in the previous paragraph that Ela Lapa was born in Tonga, justice demands that the Tongan birth registration should stand and should not cancelled or corrected (except as to date of registration).

Conclusion

The Court will therefore refuse the declaration and order requested by the Applicant; and will make the declaration asked for by the Respondent, that the registration in Tonga of the birth of Ela Lapa is correct in fact and law.