Cook Islands

Rua and Kimiia v. Maoate

High Court
Speight C.J.
23 March 1987

Constitutional law – members of Parliament – disqualification of member for extended absence – whether cured by amendment to Electoral Act 1966.

Statutes – retrospective – actions which occurred "before or after the coming into force" of Act – whether actions before the amendment can be deemed to be otherwise than they were.

Declaratory judgments – Declaratory Judgments Act 1908 (N.Z.) – declaration that parliamentary seat has become vacant under section 7 of Electoral Act 1966.

The applicants, duly enrolled electors of the Ngatangiia parliamentary constituency, sought a declaration that the Ngatangiia seat had become vacant. Dr Terepai Maoate was the member for Ngatangiia, a Rarotongan seat in the Cook Islands Parliament. Section 7 of the Electoral Act 1966 provided that the seat of a member shall become vacant if he fails, without permission of Parliament, to attend in Parliament or any committee thereof on fourteen consecutive sitting days. Dr Maoate, who was Deputy Prime Minister, had been absent overseas on thirteen consecutive sitting days. On Tuesday 25 November 1986 (and on Wednesday and Thursday, 26 and 27 November 1986) preliminary formalities of a parliamentary session were observed, but conduct lapsed because the House was inquorate.

An amendment to the Electoral Act which was passed on 13 February 1987 to take effect retrospectively provided that for purposes of section 7 of the Act, permission for failure to attend shall be deemed to have been granted by Parliament where the absent member was travelling and/or attending a conference as a representative of the Government or Parliament.

Two questions fell to be determined:

(1) Whether the respondent had been absent for the fourteen consecutive sitting days.

(2) If the answer to the first question was yes, whether such a breach of section 7 of the Electoral Act, as it was in November 1986, was cured retrospectively by the amendment of February 1987.

HELD: The order sought by the applicants was refused.

(1) A sitting of Parliament had been held on 25 November 1986 (as was conceded by counsel for the respondent): *l.* 210.

(2) The Electoral Amendment Act of 1987 operated retrospectively to deem the respondent's absence always to have been permitted by Parliament: *l.* 370.

(3) There is no constitutional bar on the Electoral Amendment Act operating retrospectively: *l.* 430.

OBSERVATION: As the learned Judge pointed out (at *l.* 250) it seems clear that the amending legislation and the litigation were both unnecessary, had parliamentary business been handled more deftly. Leave could have been granted as late as 25 November. Had an opposition member blocked the motion for leave – which must be approved "without dissent" under Standing Orders – the Standing Orders themselves could have been suspended on a simple majority. Dr Maoate's party had a clear majority in the House.

The Constitution of the Cook Islands is usefully printed with New Zealand statutes as a Schedule to the Cook Islands Constitution Act 1964, reprinted in 1976 New Zealand Statutes, Volume 4.

Cases referred to in judgment:
Hutchinson v. *Jauncey* [1950] 1 K.B. 574; [1950] 1 All E.R. 165
F.E. Jackson & Co Ltd. v. *Collector of Customs* [1939] N.Z.L.R. 682
Pardo v. *Bingham* [1869] L.R. 4 Ch. App. 735
Tangata v. *The Speaker of the Legislative Assembly*, unreported, High Court, O.A. 3/77, 23 December 1977, Donne C.J.
Wainer v. *Rippon* [1980] V.R. 129

Legislation referred to in judgment:
Acts Interpretation Act 1924 (N.Z.)
Constitution of the Cook Islands, Articles 34, 39 and 45
Cook Islands Amendment Act 1982
Customs Acts Amendment Act 1939 (N.Z.)
Declaratory Judgments Act 1908 (N.Z.)
Electoral Act 1966, section 7
Electoral Amendment Act 1987
Fugitive Offenders Act 1882 (U.K.)
Fugitive Offenders Amendment Act 1976 (N.Z.)
Interpretation Act 1889 (U.K.)
Interpretation Act 1978 (U.K.)
Landlord and Tenant (Rent Control) Act 1949 (U.K.)
Medical Research Trust (Termination) Act 1980-81
Rent Restriction Acts, 1920, 1938, 1939 (U.K.)
Unauthorised Expenditure Validation Act 1982

V. Ingram for the applicants
T. Manarangi and *S. Breed* for the respondent

SPEIGHT C.J.

Judgment:

These proceedings have been brought by two applicants, Mr Rua and Mr Kimiia who are duly enrolled electors of the Parliamentary constitutency of Ngatangiia. They seek an order of this Court pursuant to the Declaratory Judgments Act of 1908, which is in force in the Cook Islands, that the seat of their Constituency in the Cook Islands Parliament is vacant. The respondent Dr Terepai Maoate has been the duly elected member of Parliament for that constituency and the question revolves around a claim that pursuant to section 7 subsection 1 of the Electoral Act the seat

has become vacant by virtue of non-attendance of Dr Maoate in the House while he has been absent on official government business overseas. The facts can be reasonably shortly set out. Dr Maoate, who is the Deputy Prime Minister, was, pursuant to a resolution of Cabinet, authorized to travel overseas to Noumea where conferences of some importance were occurring and he was the authorized Cook Islands Government representative. During his absence there were undoubtedly thirteen sitting days of the Parliament of the Cook Islands on which business was transacted. The crucial provision under which an order is here sought is section 7(1)(e) of the Electoral Act. In the form in which it had been enacted since 1966 it read as follows:

(1) The seat of a member shall become vacant if:

...

(e) on fourteen consecutive sitting days he fails, without permission of Parliament, to attend in Parliament or any committee thereof.

That was the provision in force on 25 November of last year. Prior to that date there is no doubt that the respondent had not been present on thirteen days just referred to. On Tuesday 25 November the House was due to sit again. The evidence shows that at the appointed hour the Speaker entered the Chamber, bowed to the Chair, and took his seat in the ordinary way.

Prayers were read, the Speaker gave greetings to those members who were present who totalled some seven or eight – certainly below the quorum requisite for transaction of business in the House. The bells were rung to summon other members who were in the grounds outside the House, but they did not elect to enter and take their places. It is apparent that this was a deliberate move on the part of some ten or more Government members who had realized by this stage that this was the fourteenth day on which the House was due to sit in respondent's absence and he had not obtained leave. The majority of the members refrained from entering the Chamber in the obvious belief that absence of a quorum aborted a sitting entirely. The same situation prevailed on 26 and 27 of November when the Speaker again took his place and the preliminary formalities were observed, but further conduct of House business lapsed because of the absence of a quorum. Dr Maoate returned from overseas soon after and has resumed attendance. As will shortly be demonstrated this formality of procedure on the three days in question did contrary to the belief of some members constitute a sitting of the House.

As a consequence of these matters the Leader of the Opposition, the Honourable Geoffrey Henry, communicated with the Speaker, drew his attention to the foregoing matters and to the provisions of section 7 of the Electoral Act and indicated to him that in Mr Henry's view the seat for Ngatangiia was now vacant. The Speaker of the House was in some difficulty. The section concerned prescribes a number of matters which can lead to a vacancy. Some of these are matters which are self evident as soon as they occur. Some of them may well require considerable investigation to see whether the facts giving rise to the vacancy situation have indeed occurred. To take but one example, paragraph (i) provides for vacancy in cases of unsound mind, but it is apparent that it is for the Speaker to be satisfied that that circumstance has arisen and for that purpose provision is made for him to be furnished with proof under the hand of two medical officers. An examination of the well known case of *Tangata* v. *The Speaker of the Legislature Assembly* (Cook Islands

High Court O.A. 3/77) demonstrates the difficulties that the Speaker may encounter in satisfying himself that the member has been certified and that he ought to act. I concur with the erudite decision of the then Chief Justice Sir Gaven Donne who, though he accepted that vacancy became automatic once the circumstances were demonstrated, said that steps might need to be taken, and in that case did indeed need to be taken, before it could be ascertained for certain that the disqualifying circumstance had arisen. So too in a number of other provisions of subsection 1.

In the present case one would think that it is not difficult to ascertain:

a. That a member has in fact been absent.
b. That he has not had leave.

It is to be noted however that no provision is made in the Act as to how the situation, if it is in doubt, can be tested. If, as in the present case, it is a question of construction of law, then the Declaratory Judgments Act makes it possible for any person to apply to the Court for an interpretation of the law. I am in some doubt whether this Court would have authority in making an investigation into circumstances of fact. It may be that subsection 5 gives the Speaker prima facie responsibility but it would be difficult to know what challenge could be made thereafter to his findings of fact. Fortunately that is not a question which concerns me in this instance.

The first matter which caused trouble was the uncertainty, which obviously existed in the minds of many, as to whether or not the brief events of the morning of 25 November constituted a "sitting". The Speaker himself was apparently in some doubt and he took advice from the Solicitor-General, and from the Clerk of the House of the New Zealand Parliament. These opinions conflicted. Accordingly he invited interested persons to make application to this Court for Declaratory Judgment as has been done. As I perceive it, this application was initially to determine what constitutes a "sitting" of the House within the meaning of paragraph (e). For some reason, and possibly because of the conflicting advice that he received, the Speaker did not himself originate a Declaratory Judgment application which I fancy he was inviting the Solicitor-General to do. But in the meantime the present two applicants Mr Rua and Mr Kimiia took the appropriate steps and as electors of the constituency they have standing and were perfectly entitled to do so. They filed their application in the Court on 10 February. In the meantime and after their proceedings had been filed, the matter was somewhat changed by the introduction into the House and the passing on 13 February of an amendment to the Electoral Act. This amendment replaces the previous paragraph (e) and reads as follows:

3. Tenure of office – Section 7(1)(e) of the principal Act is repealed and the following substituted therefor:

(e) On fourteen consecutive sitting days he fails, without permission of Parliament to attend in Parliament provided however that permission for failure to so attend in Parliament (whether such failure to so attend shall have occurred before or after the coming into force of this Act) shall be deemed always to have been granted by Parliament to any member whose absence from Parliament is caused by illness or other unavoidable cause, or if the member is attending at any conference meeting or ceremony or travelling on any mission or business as a representative of the Government or of Parliament, and provided

further that Parliament may delegate its responsibilities under this paragraph to the Speaker or to any member.

Two questions therefore fall to be determined:

(1) Whether or not there has been a fourteenth sitting day giving rise to an absence of the prescribed duration.

(2) Whether, if there had been such absence, and therefore breach of the statutory provisions as they were on the statute books on 25 November, that circumstance was overtaken by the effect of the amending section which purports to be retrospective to enact that whenever absence from the House thereafter or in the past has been occasioned by occupation with government business (or certain other unavoidable causes) application for leave was not required and hence such absence did not disqualify.

When the matter came before the Court on 18 March, counsel for the respondent indicated that it was no longer contended that the brief events of 25 November did not constitute a sitting day. For myself, in view of the wording of Article 34 of the Constitution, and from reading of Standing Orders I accept that that concession was properly made, and as a matter of interest note that it accords with the opinion which the Speaker received from the Clerk of the New Zealand Parliament. But until the hearing that was a live issue.

The issue, which is at the heart of the matter, can be summarized as follows:

(1) There is now no doubt that at the relevant date the respondent had been absent from the House for fourteen days and had not applied for, nor been granted leave of absence.

(2) According to the affidavits which are unchallenged he was indeed attending to official business overseas as a representative of the Government.

(3) In view of the two previous items, a plain reading of paragraph (e) as it was on the statute books on 25 November would mean that the seat became vacant after the close of sittings on that date – although perhaps some investigations might have needed to be made to establish factual or legal matters. However when, by whatever means, those matters were established either by the Speaker, by the Court or otherwise, the vacancy would retrospectively be held to have existed as from the close of the sittings of 25 November.

(4) The amending paragraph now states, that in the circumstances just discussed, namely absence on government business, such leave is not now required and the question of vacancy of the seat cannot hereafter arise by virtue of such absence.

(5) The amending paragraph also says that (and I paraphrase) "not only does absence on such business hereafter negative the need for leave of absence but even if such absence occurred before 13 February 1987 (the date of assent to the amendment) it shall be deemed that such leave was not necessary." Put bluntly was the previously existing paragraph not in force, as it appeared to have been on 25 November?

It is clear from the evidence of Mr Geoffrey Henry, both by affidavit and also in Court, that as a matter of practice Parliament has always given leave of absence in appropriate cases and no suggestion has been made on the part of the applicants

that this case would not have been so treated. Mr Henry told the Court that it would be virtually unthinkable that leave would not have been granted on 25 November had an application been made.

I digress to say that the narrow compass of the matter can be shown from a reference in Mr Akaruru's affidavit. He apparently suggested to the Acting Leader of the House that there would be no difficulty if leave was applied for. A point emerged that under Standing Orders one objector could block a motion for leave which must be voted for "without dissent". This may have been the worry of those who did not answer the bell – an unnecessary one for, as Mr Henry points out, Standing Orders can be suspended on a simple majority and there was an ample majority of members of Dr Maoate's party in Parliament. The whole affair arises therefore from a futile misunderstanding – a comedy of errors – but I must grapple with the matter now pleaded.

Now it is clear law in the interpretation of statutes that there is a presumption against retrospective operation unless such a construction appears clearly from the terms or by inescapable implication. Laws should only govern the rights and duties of citizens prospectively, that is to say, from the date that they were enacted and thereafter. The logic and justice of this proposition is of course unassailable, for persons govern their actions by the law as they understand it to be, and most particularly by the law as it is from day to day proclaimed by Parliament. It would be an injustice if rights and duties which have been received and discharged in the belief of existing law should thereafter be altered by retrospection. Nevertheless it is equally clear that provided the intention of Parliament has been clearly demonstrated that an enactment is to have retrospective effect, then that consequence will follow because of the nature of Parliamentary supremacy. It may do or undo its own legislation. It may declare facts to be non-fact. No difference of opinion has emerged between counsel on these general principles, and I therefore propose to traverse as best I can the careful submissions made by Mr Ingram. I do however make the following reservation.

He made a specific plea that a judgment in this matter should be delivered as soon as may be convenient and if possible before Monday 23 March, that being the next day on which Parliament was due to assemble. He related this submission to the fact that the attendance and vote of a member whose seat ought to have been regarded as vacant but which has not yet been definitively so declared can vote in the enactment of legislation, and this can not be subsequently undone. (Constitution Article 34.)

In particular Mr Ingram urged the need for swift resolution because in the Parliamentary situation which prevails at the moment the presence or absence of the respondent member, if voting takes place in accordance with party lines can make or unmake the two thirds majority which could enable the House to alter the Constitution in any matter. Having given consideration to the legal submissions made, I have reached certain conclusions. I make it quite clear that had I not have been able to decide one way or the other, I would not have been encouraged to make a rash assessment out of pure practicalities. But from a consideration of the basic, and as I believe well understood principles, I can come to firm conclusions which I shall endeavour to express; but given more voluminous text books and greater access to Law Reports than are currently available in this country I would have hoped to state these matters with greater elegance.

As already said no one quarrels with the general proposition that the repeal of an Act, and by analogy the amendment of part of an Act, does not affect status until commencement. But that rule is set aside if a contrary intention to alter status is demonstrated by plain words. Good government sometimes requires that past circumstances shall be fictionally changed. That is to say the law may in some cases tell us that a status or a right which under law previously existed, no longer exists. An example was the U.S. Fugitive Offenders Act 1882 – as applied in New Zealand. Certain classes of persons were declared to be deportable. By a Supreme Court decision in 1975 it was held that the law was not what it had always appeared to be, and that on its true interpretation a given class of persons was not deportable. By an amendment in 1976 it was declared that the law was to be deemed to have made provisions which the Court had held it did not in fact make. There was a saving clause, so that the individual litigant who had benefited by the unexpected interpretation had his position preserved – but in all other respects the law was declared always to have been something which proper interpretation had said was not the case. As a consequence other persons who had not been given the benefit of the saving clause had their previously illegal deportation rendered legal.

Another New Zealand example was an amendment required as a consequence of the decision of the Supreme Court in *F.E. Jackson & Co. Ltd.* v. *The Collector of Customs* [1939] N.Z.L.R. 682. By the Customs Acts Amendment Act 1939 laws which had previously been invalid were declared always to have been valid – and consequently previous actions of enforcement and regulating officers which had in truth been unlawful were by retrospection made lawful.

To some extent these can be referred to as declaratory amendments. Of greater relevance is *Hutchinson* v. *Jauncey* [1950] 1 K.B. 574; [1950] 1 All E.R. 165. Previously existing rights of a landlord were set aside by retrospection. As at March 1949 there was a tenancy of premises which in the state of the then existing provisions of the law placed the tenancy outside the protection of the Rent Restriction Act. In May the landlord commenced eviction proceedings. In June the Landlord and Tenant (Rent Control) Act came into force and under its provisions (section 9) tenancies of this particular class became protected.

Section 10 provided:

> The last three foregoing sections shall apply whether the letting in question began before or after the commencement of this Act . . .

Then followed a proviso concerning rent recovery which is not relevant to present consideration.

It was argued that the landlord's rights, claimed in proceedings issued prior to the passing of the new Act, and continued after it, could not be retrospectively altered by this provision.

The English Court of Appeal had no hesitation in rejecting that submission and holding these to be clear words intended to have retrospective effect. One could be pardoned for thinking the draftsman of the Electoral Amendment had that case before him when he used the words "whether such failure to so attend shall occur before or after the coming into force of this Act". Mr Ingram's written submissions and the painstaking material he has filed in support are a tribute to his learning and his thoroughness. They provided a model which practitioners in many jurisdictions could envy.

They can be considered under two broad headings:

(1) Do the words of this amending section admit of any other interpretation than this Parliament has clearly manifested its intention and has effectively worded its amendment to alter the disqualifying circumstances retrospectively.

(2) Alternatively, even if this was the intention, and the words clearly appear to bring about that result, was such action ultra vires Parliamentary power by virtue of the Constitution and in particular Articles 39 and 45.

On the first of these points I do not think it necessary to say much more than to restate the general principle of legislative intentions – the application of which is shown in the New Zealand and English cases. Mr Ingram has submitted that the only way such a result can be achieved is by antedating commencement, and he cites the Cook Islands Amendment Act (1982 No. 4) and the Medical Research Trust (Termination) Act (1980-81 No. 21) as examples. Certainly that is one way and a very clear way of legislating for this purpose – but it is not the only way. It was not used in the Unauthorised Expenditure Validation Act (1982 No. 9) nor in the cases referred to earlier.

Not only does the amendment use the words "whether before or after the coming into force" – as in *Hutchinson* v. *Jauncey* – but it uses the additional weapon of deeming – "shall be deemed always to have been".

"Deeming" can have a variety of meanings and uses. Sometimes it is to make certain a meaning which might otherwise have been debateable; sometimes it is to establish a presumption which may be rebutted; and sometimes, as here, it is to require certain facts to be taken to exist which in truth would not be so held but for legislative dictate. An Australian Judge said that "when the legislature uses the word 'deemed' it requires the acceptance of a fictional state of affairs that would be otherwise if one were not so required by the legislation" – O'Bryan J. in *Wainer* v. *Rippon* [1980] V.R. 129 at 135.

In my view the wording of the amendment, taken as a whole, allows of no other conclusion but that the absence of the respondent for the reason proved does not and did not result in his seat becoming vacant.

I turn to Mr Ingram's second group of submissions based on the Constitution, namely:

a. The amendment is not a law made for the peace, order and good government of the Cook Islands (Article 39).

b. The amendment cannot operate in respect of events of 25 November 1986 because Article 45 provides that unless otherwise specified an Act shall come into operation on the day it is assented to – in this case 13 February 1987.

As I understand point (a) the submission is that there has been a disenfranchisement of the electors of Ngatangiia because they are entitled to have their member present in Parliament, and if he "defaults" they are entitled to a by-election to replace him with a "non-defaulter" (Mr Ingram's words). It is submitted that it has been the vote of Parliament which preserved Mr Maoate in his seat when the right to confirm him there, or to replace him lay with the electors – and deprivation of the franchise is not a measure "for the good government of the Cook Islands".

I think the answer can be shortly stated. In its original form and in its amended form Parliament is entrusted with the power to excuse members from attendance – and has often done so for quite long periods – and during such periods the individual constituents are temporarily without the services of their member but unable to replace him. It could be said that at such times they have been temporarily disenfranchised. But it has not been suggested that that is contrary to good government – indeed without such provision, particularly in cases of official business, good government would be impaired. The point of this complaint is that on this occasion the leave of absence was not voted on before the fourteenth day but after it. The fact that it was done retrospectively is not part of this argument. Assuming the correctness of the decision already reached on that point, I cannot see that a parliamentary act permanently removing a disqualification is in a different category in the context of good government from a resolution avoiding such disqualification before it occurred. And if the amendment is, as conceded, good government prospectively, how does it cease to be so if done retrospectively?

A resolution would have been that the welfare of the country would be served by Dr Maoate travelling on government business – the amendment was a determination to the same effect ex post facto. I cannot refrain from adding that a slavish desire to remain continuously within the Cook Islands has not always, to my observation, been a distinguishing feature of some Parliamentarians – but no constitutional challenge seems to have previously been made to the propriety of the enabling procedures.

Point (b) deals with Article 45. Mr Ingram submits that there is a special feature here which distinguishes the Cook Islands' provision from other legislative systems. He relies upon the phrase "come into operation" as showing that only by antedating (as in the Medical Research Trust (Termination) Act) can retrospection be achieved and that this Article is worded to make this the only available procedure. As already mentioned, that is certainly one method, but in other jurisdictions the "clear words" technique has been held to be equally effective as we have seen. I think the provisions are universal. On the present point we are concerned with two separate things.

An Act comes into force, or comes into operation on the relevant date – that means it becomes part of the general body of the law of the land. But the meaning of its provisions is to be found by studying the enactment internally and construing it according to the tenor of those provisions. These are two quite separate concepts. There is nothing novel in the Cook Islands Article 45 – it is to all intents and purposes in the same wording as section 8 of the Acts Interpretation Act 1924 (N.Z.) and that followed the United Kingdom Interpretation Act 1889 (section 36) – subsequently re-enacted in 1978.

Prior to these enactments (and their predecessors) in England all Acts were taken to have come into force on the first day of the Parliamentary session – with resulting confusion inter se, and with the consequence that many provisions were thereby made retrospective without Parliament having so intended. It was for this purpose that the "coming into operation" procedure was enacted – but that merely identifies when the law is put in place.

For the meaning of an enactment once it is operative "we must look to the general scope and purview of the statute and at the remedy sought to be applied and consider what was the former state of the law and what it was that the legislature

contemplated" – Lord Hatherly L.C. in *Pardo* v. *Bingham* (1868-69) L.R. 4 Ch. App. 735 at 740 – a retrospection case.

For the foregoing reasons I hold the Electoral Amendment Act 1987 section 3 is retrospective and the order sought is refused.