

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.408/83

1039

BETWEEN

PONISETA TAIMALELAGI
of Wellington,
Married Woman

Plaintiff

reported
[1985] LRC (Const)
940 (but report not
actually seen only reference spotted)

AND

THE ATTORNEY GENERAL in
and for New Zealand in
respect of the Secretary
for Internal Affairs

Defendant

Hearing 3 September 1984

Counsel C B Ruthe for plaintiff
R B Squire for defendant

Judgment 4 September 1984

JUDGMENT OF DAVISON C.J.

The plaintiff has issued an originating summons under the Declaratory Judgments Act 1908 for the purpose of obtaining a Declaratory Order answering the question of whether :

" On the true construction of the
Citizenship (Western Samoa) Act 1982
is the plaintiff a New Zealand citizen?"

THE PROCEDURE ADOPTED

Mr Squire for the defendant submitted that the Court should not deal with this matter under the provisions of the Declaratory Judgments Act 1908 because the question posed for the Court's decision involves matters of both fact and law and the plaintiff's legal argument is founded upon assertions of fact which may or may not be correct. The present proceedings, he said, provide no opportunity for the Crown to challenge the facts if they are untrue. He referred to New Zealand Insurance Co v Prudential Assurance Co [1976] 1 NZLR 84, and Turner v Pickering [1976] 1 NZLR 129.

Mr Squire pointed particularly to allegations of fact concerning -

- (a) The plaintiff's date of birth
- (b) Her father's date of birth
- (c) That she is the daughter of her father.

Attached to the plaintiff's affidavit are certificates under the seal of the Registrar General of Births, Deaths and Marriages for Western Samoa purporting to evidence -

- (a) The birth of plaintiff's father on 9 September 1935
- (b) The marriage of plaintiff's father on 3 January 1955
- (c) The plaintiff's birth on 2 May 1957.

Section 9(1) (a) of the Citizenship (Western Samoa) Act 1982 provides:

- "s.9 (1) For the purposes of determining whether any person is or is not a person to whom this Act applies, -
- (a) A person shall, in the absence of evidence to the contrary, be presumed to be the father of another person if he is or was married to that other person's mother at the time of that other person's conception or birth. "

A reference to the certificates shows:

- (a) That a male (allegedly the plaintiff's father) of Christian names Tauailapalapa Pati was born to a father of surname Lauoge on 9 September 1935.
- (b) A bridegroom with name and surname Pati Mati was married at age 20 on 3 January 1955. The father of the bridegroom was given as Mati Tuigamala. The bride was named as Fofoga Tua.
- (c) The plaintiff's birth certificate evidencing a birth on 2 May 1957 gives the father simply as Pati and the mother as Fofoga.

In spite of variations in name, the likelihood is that the plaintiff's parents were the persons recorded on the marriage certificate and that her father was the Tauailapalapa Pati born on 9 September 1935. What requires some explanation, however, is how the father named Tauailapalapa Pati in his birth certificate becomes Pati Mati in his marriage certificate and simply Pati in the plaintiff's birth certificate.

I agree with Mr Squire that this case does depend upon the plaintiff establishing matters of fact as a foundation upon which the Court is asked to determine the issues of law and the originating summons procedure is inappropriate in such a case. It would be wrong for the Crown to be bound by a declaration which accepts as proved facts which the Crown does not admit and which it has had no opportunity to investigate or challenge.

In the ordinary course I would have exercised my discretion against ruling upon the question which has been posed at all. However, in the view I take of the matter, even assuming in her favour that the facts as alleged by the plaintiff are true, the question must be answered against her, and for the convenience of the parties I go on to give my reasons for reaching such a conclusion.

THE PLAINTIFF'S CASE

The plaintiff seeks a declaration that she is a New Zealand citizen. She bases her claim that she is a New Zealand citizen on the following propositions:

1. Her father was a New Zealand citizen prior to the coming into force of the Citizenship (Western Samoa) Act 1982 on 15 September 1982 by reason of his being a person to whom the decision of the Privy Council in Lesa v Attorney-General of New Zealand [1982] 1 NZLR 165 applied.
2. She was by reason of being the child born of a New Zealand citizen, also a New Zealand citizen.

3. Her father lost his New Zealand citizenship on 15 September 1982 by virtue of s 6 of the Citizenship (Western Samoa) Act 1982 and she likewise lost her New Zealand citizenship.
4. Her father subsequently applied to the Minister of Internal Affairs in New Zealand for New Zealand citizenship pursuant to s 8 of the Citizenship Act 1977 and was granted such citizenship on 16 December 1982.
5. The plaintiff claims that as her father is now a New Zealand citizen, s 4(2) of the Citizenship (Western Samoa) Act 1982 applies to her father and he is no longer deprived of his New Zealand citizenship by s 6 of the Act and that she as his child, the child of a person who is now a New Zealand citizen, is no longer deprived of New Zealand citizenship either. To put the argument in the words in which it was advanced by Mr Ruthe on behalf of the applicant - the plaintiff and her father were deprived of New Zealand citizenship by s 6 of the 1982 Act. Her father became a New Zealand citizen again by grant from the Minister under s 8 of the Immigration Act 1977 and thereupon the bar to the plaintiff being a New Zealand citizen (on the grounds of her being a descendant of a New Zealand citizen) was lifted from her.

INTERPRETATION OF THE STATUTE

One of the reasons for the passing of the Citizenship (Western Samoa) Act 1982 was to negate the decision of the Privy Council in Lesa v Attorney General of New Zealand (ante) in other than Lesa's own case. The Act set out to deprive of New Zealand citizenship certain classes of persons. Those persons are set out in s 4(1) and include:

- "s 4(1) (a) Every person -
- (i) Who was born in Western Samoa on or after the 13th day of May 1924 and before the 1st day of January 1949; and

- (ii) Who, immediately before the 1st day of January 1949, was a British subject by virtue only of having been born in that country.
- (e) Every person -
 - (i) Who is the descendant of any person to whom any one or more of paragraphs (a) to (d) of this subsection applies; and
 - (ii) Who was or is born on or after the 1st day of January 1949. "

The plaintiff's father falls within s 4(1)(a)(i) as having been born between 13 May 1924 and 1 January 1949, namely on 9 September 1935. He also falls within s 4(1)(a)(ii) as he was a British subject by virtue only of having been born in Western Samoa.

The plaintiff, too, falls within s 4(1)(e) in that she is the descendant of a person referred to in s 4(1)(a) and in that she was born on or after 1 January 1949, namely, on 2 May 1957.

As a saving provision, however, s 4(2) of the Act exempted persons who had acquired New Zealand citizenship by a means other than by simply being one of the persons who had been held to be British citizens in Lesa's case. For example, persons who had been granted New Zealand citizenship under the Citizenship Act of 1977 or its predecessor. Section 4(2) provides:

" This Act does not apply to any person who is a New Zealand citizen otherwise than by virtue only of being a person to whom any one or more of paragraphs (a) to (e) of subsection (1) of this section applies. "

On 15 September 1982 at the date of the coming into force of the Citizenship (Western Samoa) Act 1982 neither the plaintiff nor her father could claim the exemption provided for in s 4(2). They were thus deprived of their former New Zealand citizenship, to which Lesa's case had held them to be entitled, by s 6 of the Act which provides:

" Notwithstanding anything in the Citizenship Act 1977 or in any other enactment but subject to section 5 of this Act, every person to whom this Act applies shall be deemed never to have been a New Zealand citizen, and no such person shall be a New Zealand citizen unless the Minister of

Internal Affairs authorises the grant of such citizenship to that person under section 7 of this Act or any of sections 8 to 10 of the Citizenship Act 1977. "

Section 5 of the Act therein referred to made special provision for Lesa.

It will be noted that s 6 contains two principal elements. They are:

1. The plaintiff and her father to whom the Act applied, on 15 September 1982 "shall be deemed never to have been New Zealand citizens".
2. No such person - including the plaintiff and her father - "shall be a New Zealand citizen unless the Minister of Internal Affairs authorises the grant of such citizenship to that person" under s 7 of the Act or ss 8 - 10 of the Citizenship Act 1977.

The effects of those provisions in s 6 are that the plaintiff and her father had from 15 September 1982 no claim to New Zealand citizenship and such citizenship could only be gained by grant by the Minister under ss 8-10 of the Immigration Act 1977.

The plaintiff's father did so apply and was granted New Zealand citizenship. The plaintiff has not so applied and been granted such citizenship. The plaintiff as the descendant of her father does not gain New Zealand citizenship on the grant of such citizenship to her father by the Minister under the Immigration Act 1977. If she is to acquire it she must do as s 6 of the Citizenship (Western Samoa) Act 1982 provides and she must herself apply to the Minister.

The plaintiff's argument is that as s 4(2) of the Act does not apply to any person who, for example, acquires New Zealand citizenship by grant from the Minister, her father

who has subsequent to the passing of the Act been granted citizenship, is no longer one of the persons deprived of New Zealand citizenship by s 6 and correspondingly she, too, is no longer so deprived.

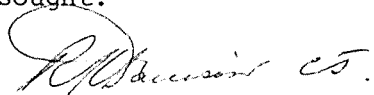
The flaw in that argument is, however, that s 4 of the Act sets out the persons who are "deemed never to have been New Zealand citizens" as at 15 September 1982. The plaintiff and her father were such persons. The entitlement to New Zealand citizenship thereafter must be gained by grant from the Minister.

I agree with Mr Squire's submission that for the plaintiff's argument to prevail s 6 would have to be interpreted in a qualified sense by the insertion after the words "Every person to whom this Act applies shall" the words "while it applies" or some such words so as to give it a present temporal connotation so that the plaintiff's deprivation of citizenship continues only so long as her father's continues. I see no justification whatever for so interpreting s 6.

The situation so far as the plaintiff is concerned is simply expressed by saying: she was deprived of her New Zealand citizenship by s 6 of the Act and was deemed never to have been a New Zealand citizen. A person in the plaintiff's situation who is the child of a person "never deemed to have been a New Zealand citizen" and who has herself never been a New Zealand citizen can only gain such citizenship by grant from the Minister. She does not gain New Zealand citizenship by descent under the Citizenship Act 1977 by virtue of the fact that her father, who was not a New Zealand citizen, has now been granted New Zealand citizenship.

The plaintiff is not a New Zealand citizen. She is not entitled to the declaration sought.

Solicitors for the plaintiff
Solicitors for the defendant


Rosenberg, Denee & Co (Wellington)
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