

51
NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1268/95



UNDER the Citizenship Act 1977

IN THE MATTER of an application for a
declaration under s.19
Citizenship Act 1977

BETWEEN MAN BAHADUR LAMA of
1/46 Line Road, Glen Innes,
Auckland, Painter

Plaintiff

AND THE MINISTER OF INTERNAL
AFFAIRS, Wellington

Defendant

Hearing: 6 June 1997

Counsel: Plaintiff in Person
M.L.F. Townsley for Defendant

Judgment: 18 JUN 1997

JUDGMENT OF POTTER, J.

Solicitors: Crown Law Office, Wellington for Defendant (DX SP 20208,
Wellington)

The plaintiff, Mr Lama, seeks a declaration under s.19(2) of the Citizenship Act 1977 ("the Act") that there are insufficient grounds to justify the making of an order by the Minister of Internal Affairs under s.17 of the Act, depriving the plaintiff of New Zealand citizenship.

Facts

The facts, which are not disputed, are as follows:

- The plaintiff arrived in August 1987.
- On 26 February 1988 he married a New Zealand woman, Shirley Anne Lama (née Ross)..
- On 23 July 1988 he applied to the Minister of Immigration for New Zealand citizenship.
- On 20 March 1989 New Zealand citizenship was granted under s.8(a) of the Act on the grounds that the plaintiff was married to a New Zealand citizen and otherwise met the requirements of that section.
- In 1992 the plaintiff and Shirley Anne Lama separated. They reconciled approximately six months later and there was a final separation on 8 September 1994.
- On 27 August 1995 the Minister issued a notice of intention to deprive the plaintiff of New Zealand citizenship under s.17 of the Act. The notice, which was served on the plaintiff on 18 September 1995 was in the following terms:

"NOTICE OF INTENTION TO DEPRIVE PERSON OF NEW ZEALAND
CITIZENSHIP UNDER THE CITIZENSHIP ACT 1977, SECTION 17

TO MAN BAHADUR LAMA, 54 Long Drive, St Heliers Bay, AUCKLAND.

I, WARREN ERNEST COOPER, Minister of Internal Affairs, HEREBY GIVE YOU NOTICE that I intend to deprive you of your New Zealand citizenship.

I hereby consider that I have grounds for making such an order under section 17 of the Citizenship Act 1977, as:

- (a) you acquired New Zealand citizenship by grant under Section 8 of the Citizenship Act 1977; and
- (b) that grant was procured by fraud, or by false representation, or by wilful concealment of relevant information, or by mistake, in that, in support of your application for the grant of citizenship, you stated that you were married to a New Zealander. This marriage was bigamous, you having contracted a previous marriage in Nepal which had not been lawfully dissolved.

You are advised that you have the right to have this matter reviewed by the High Court of New Zealand. If you wish to exercise that right you must, within 28 days after the service of this notice on you, apply to the High Court for a declaration that there are insufficient grounds to justify the making an order under section 17 of the Citizenship Act 1977 depriving you of New Zealand citizenship."

- During 1996 the plaintiff was involved in two sets of proceedings in the District Court, the first under the Matrimonial Property Act *Lama v Lama* (District Court, Otahuhu, FP.No.048/176/95, 16 February 1996, Judge Bremner) and the second under s.347 of the Crimes Act, *R v Lama* (District Court, Otahuhu, T.174/95, 16 May 1996, Judge Bouchier).
- On 9 October 1995 the plaintiff commenced proceedings in this Court for a declaration that there are insufficient grounds to justify the making by the Minister of an Order under s.17 of the Act. The plaintiff's proceedings were thus filed within the 28 days time limit in s.19(2) of the Act.

Statutory Provisions

The relevant statutory provisions are as follows:

"17. Deprivation of New Zealand citizenship in case of fraud, etc. - (1) This section applies to a New Zealand citizen who has acquired that citizenship -

(a) By registration under the British Nationality and New Zealand Citizenship Act 1948; or

(b) By naturalisation under that Act; or

(c) By grant under this Act or the citizenship (Western Samoa) Act 1982.

(2) Subject to section 19 of this Act, the Minister may, by order, deprive a New Zealand citizen to whom this section applied of his New Zealand citizenship if he is satisfied that the registration, naturalisation, or grant was procured by fraud, false representation, or wilful concealment of relevant information, or by mistake."

19. Court review of grounds for depriving person of citizenship - (1) Before making an order under section 16 or section 17 of this Act depriving any person of New Zealand citizenship, the Minister shall serve on that person a notice -

(a) Stating that he intends to make such an order; and

(b) Citing the section of this Act under which he considers that he has grounds to make such an order; and

(c) Specifying the grounds on which he intends to make such an order; and

(d) Advising the person of his right to have the matter reviewed by the Court in accordance with the succeeding provisions of this section.

(2) Every person upon whom a notice is served under subsection (1) of this section may, within 28 days after it is served on him, apply to the High Court for a declaration that there are insufficient grounds to justify the making of an order under section 16 or, as the case may require, section 17 of this Act depriving the applicant of New Zealand citizenship; and the Court may make or refuse to make such a declaration accordingly.

(3) Notwithstanding any of the foregoing provisions of this section, in any case where the whereabouts of the person concerned are unknown or for any other reason service on him of a notice under this section is not practicable, the Minister may apply to the Court for the dispensing of the requirement to serve notice; and, in such a case, if the Court dispenses with that requirement, it shall proceed to consider the merits of the case, in accordance with the provisions of this section, as if the person concerned had applied to the Court for a declaration of the kind referred to in subsection (2) of this section.

(4) Where the Court makes such a declaration, the Minister shall not thereafter, without fresh cause, make an order under section 16 or 17 of this Act depriving the applicant of New Zealand citizenship.

(5) *Repealed by s.3(4) of the Judicature Amendment Act 1991.*

(6) Subject to the succeeding provisions of this section, the procedure in respect of an application under this section shall be in accordance with the rules of Court.

(7) When hearing any application under this section the Court may receive as evidence any statement, document, information, or matter that, in the opinion of the Court, may assist it to deal justly with the application before it, whether or not the same would be otherwise admissible in proceedings before the Court.

(8) Where the Court is satisfied that it is desirable to do so by reason of the confidential nature of any evidence submitted or to be submitted to it in respect of any application under this section, the Court may, of its own motion or on the application of any party to the proceedings, -

(a) Take or hear the evidence in private:

(b) Make an order prohibiting the publication of any report or account of the whole or any part of any such evidence (whether heard or taken in public or private).

(9) The determination of the High Court on any such application shall be final."

The notice served on the plaintiff is notice of the Minister's *intention* to make an order under s.17. The plaintiff has exercised his right under s.19(2) to apply to this Court for a declaration. It is for this Court to decide, and to declare, whether there are insufficient grounds to justify the making by the Minister of the order under s.17.

This is not a traditional judicial review of an administrative decision already taken, but a consideration by this Court as to the sufficiency or otherwise of the grounds to justify an order which the Minister intends in the future to make. I consider it appropriate, and indeed incumbent upon me therefore, to consider all the evidence that is placed before me, not only the evidence that may have been available to the Minister at the time of issuing the notice, because the order has yet to be made.

It is convenient to note that the evidence which this Court may consider is, pursuant to s.19(7) *any* evidence which in the opinion of the Court may assist the Court to deal justly with the application whether or not that evidence would be otherwise admissible in proceedings before the Court. That provision is important because most of the evidence placed before me is of a hearsay nature, or of a type which would otherwise be inadmissible in proceedings before the Court.

I also note that pursuant to s.19(9) the determination of this Court on the plaintiff's application, is final.

Onus of Proof

In the case of *Chao Lai Heng v Minister of Internal Affairs* (unreported, High Court, Auckland Registry, M.616/95, 24 April 1996) at page 6 Salmon, J. stated:

"The defendant [the Minister of Internal Affairs] argued that the onus of proof was on the plaintiff to satisfy me that insufficient grounds existed. On a strict reading of the section that may be so. However, given the fact that most of the information that must come before the Court to enable a decision to be made is in the control of the defendant, the question of onus of proof does not seem to be of great significance in this case."

I agree with Salmon, J. that the scheme of ss.16 and 17 and s.19 of the Act is that once the Minister has formed the view that there are sufficient grounds to justify the making of an order and has issued a notice of his intention to do so, the onus shifts to the applicant, the plaintiff in this case, to satisfy the Court that there are not sufficient grounds to justify the making of the order intended by the Minister. In the situation before the Court in *Chao Lai Heng v Minister of Internal Affairs* (supra) the information to be put before the Court to enable a decision to be made was in the control of the Minister. That is not the position here. In this case the bulk of the evidence in relation to the plaintiff's marital status is either in his possession or within his control. Pursuant to the Act, and in the circumstances of this case, the onus is on the plaintiff to prove to the Court on the balance of probabilities that there are insufficient grounds to justify the making of an order under s.17.

It is important to note that the onus of proof in this case differs from the onus in the two other proceedings mentioned above in which the plaintiff has been involved. In the matrimonial property proceedings the onus of proof was on the plaintiff's wife. The Court found that onus had not been discharged. Judge Bremner said in his decision at page 4:

"I am not satisfied that the wife on the balance of probabilities has established either that the husband was previously married in Nepal or that the marriage was entered into for the benefit of the husband."

In the second proceeding the Court was considering an application by the plaintiff in this case for a discharge under s.347 of the Crimes Act in respect of bigamy charges brought pursuant to s.205(1)(a) of the Crimes Act. The onus in the criminal proceedings was on the Crown and the standard proof was the criminal one, namely that the alleged bigamy must be proved beyond reasonable doubt. Judge Bouchier found that the Crown did not have sufficient evidence to prove the charge to the necessary standard of beyond reasonable doubt.

In these proceedings the onus of proof lies on the plaintiff. The obligation on the plaintiff is to satisfy this Court that on the balance of probabilities he had not entered into a previous marriage in Nepal and accordingly, that there are not sufficient grounds for the Minister to make an order under s.17 of the Act.

The reason for the onus, resting as it does with the plaintiff is, I believe, clear from the scheme of the Act. The granting of New Zealand citizenship is a privilege conferred only upon those who can satisfy the stringent criteria set out in the Act. The obligation to satisfy the Minister that the criteria are met rests with the person making the application for citizenship. The grant is entirely at the discretion of the Minister and the Minister will not exercise his discretion in favour of the applicant unless he is satisfied that all requirements are met. If, at a later stage, the Minister is satisfied on the basis of evidence available to him that any of the criteria upon which the grant was made was not met, then the Minister, after giving appropriate notice, may make an order withdrawing the privilege of citizenship previously granted. This is, of course, subject to the decision of this Court when the person to be deprived of citizenship exercises his or her right under s.19(2) to apply to this Court. The onus or obligation of satisfying the Minister that the criteria are met remains always with the applicant for citizenship.

The conclusion I have reached as to the onus of proof is reinforced by reference to *Hansard*. During the second reading of the Citizens and Aliens Bill (as it was then called - 415 NZPD 4381 (9 November 1977)), the Honourable Dr A. M. Finlay commented:

"If we look at clause 18, the right for deprivation, he has to show that there are insufficient grounds to justify the ministerial order taking away his right of citizenship. The onus of proof is thrust around by this means of requiring him to show there are sufficient grounds, and, of course, the onus would be and should be on him. (Emphasis added.)"

The Evidence

A good deal of evidence has been submitted by affidavit. The plaintiff, Mr Lama, was required by the defendant for cross-examination and gave evidence on oath.

Counsel for the defendant submitted to me that I should not admit into evidence three affidavits filed by the plaintiff on 3 June 1997 as they were filed long after the extended agreed date for filing of affidavits, and in those circumstances the defendant has had no opportunity to file affidavits in reply, nor to require the deponents to be available for cross-examination. It was further submitted that if the affidavits were admitted, they should be given little or no weight for a variety of reasons articulated by counsel. I note that the affidavit of Roshan Bhattarai was filed by the defendant on 30 May 1997 as a copy, and the original affidavit was handed to the Court at the hearing. In these circumstances I propose to admit all affidavits filed in this matter, according them such weight as in my opinion is just. As stated above, much of the evidence presented before the Court would not be admissible under normal rules of evidence and I consider it pursuant to the powers given me by s.19(7) of the Citizenship Act 1977.

The plaintiff claims that he has never been married prior to his marriage in New Zealand in 1988 to Shirley Anne Lama. He claims that the person in Nepal said to be his wife, Dhan Maya Lama, is in fact his sister

and that he has never been married to his sister. In support of his contentions he produced:

- The marriage certificate of Dhan Maya Lama and Dhan Bir Tamang on 24 April 1979. The certificate was issued on 13 September 1995 by the Ratnanagar Registry Office, Chitwan.
- A certificate from the Ratnanagar City Converting Village Development Committee signed by Nijananda Malla, Chairman, confirming that marriage.
- A statement through Interpol under the hand of Kesh B. Shahi, Deputy Superintendent of Police dated 19 July 1995 that: "Marriage registration was not popular in Nepal, at the time when Man Bahadur Lama and Dhan Maya Lama were married. So, marriage certificate between Man Bahadur Lama and Dhan Maya Lama is not available."
- A further statement through Interpol dated 29 January 1996 under the hand of Retaj Bahadur Dhu, Deputy Superintendent of Police which states, "It was also learned through the local police that Man Bahadur and Dhanamaya Lama were involved in a love marriage in 2022V.S.(1965AD) and were staying together. In 2038V.S.(1981AD) personal differences between the two, Man Bahadur renounced his wife and family eight years ago and went abroad. However, there is no document state that they have been married nor are they legally divorced."

- A statement from the Ratnanagar City Orientated Village Development Committee dated 4 July 1996 that there is no entry in the marriage registration book for M. B. Lama. This is signed by Nijananda Malla, Chairman.
- A further statement from the Ratnanagar City Orientated Village Development Committee that Man Bahadur Lama is not married yet and that a new married couple are required to register the marriage within 35 days. That statement is also dated 4 July 1996 under the hand of Nijananda Malla, Chairman.
- A statement dated 28 November 1996 from Shiv Pandey described as a legal adviser to Mr Lama that Mr M. B. Lama has never been married in Nepal.
- An affidavit from Dhan Maya Lama, dated 12 May 1997, testifying that she is the sister of Mr Lama, that she is married to Mr Dhan Bir Tamang that to her knowledge Mr M. B. Lama has never been married in Nepal and that she is angry at the allegation that her brother Mr M. B. Lama is her husband.

Evidence from the Minister was presented principally in an affidavit by John Beith Atkinson, Manager, Investigations, Documents of National Identity Branch of the Department of Internal Affairs. (Mr Atkinson annexed to his affidavit a report and exhibits provided by John Flannery of Peelers Investigations Ltd who had been instructed by Mr Atkinson on behalf of the Department to carry out investigations as to whether the plaintiff had a

marriage previous to his marriage to Shirley Anne Lama); and an affidavit from Roshan Bhattarai described as Crime Investigator of Kathmandu who deposed to investigations concerning the same matter, namely any previous marriage of the plaintiff, carried out on the instructions of the New Zealand Department of Internal Affairs given through the New Zealand High Commission in New Delhi during the period June 1996 to April 1997. Both deponents concluded as a result of their enquiries, that the plaintiff was married in Nepal to Dhan Maya Lama.

I will not attempt to canvas all the evidential material exhibited to these affidavits, but I have had regard particularly to the following: a certificate from the District Police Office, Chitwan, Bharatpur signed by Dilip Bahadur Basnyet, Police Inspector, dated 9 August 1995 certifying to a marriage in 1965 between the plaintiff (age approximately 40) and Dhan Maya Lama, and original land ownership certificates with English translations, in respect of a property described as 8/238/house land/whole, in the name of Dhan Maya Lama, transferred to Ms Man Kumari Malla, and subsequently on 24 November 1996 when the plaintiff was in Nepal (which is not disputed) transferred to the plaintiff, Man Bahadur Lama. The plaintiff in cross-examination identified the property as a property he owns in Nepal. Significantly the land ownership certificate in the name of Dhan Maya Lama shows her husband as Man Bahadur.

In paragraph 35 of his affidavit Mr Bhattarai testifies to seeing a citizenship certificate in the name of Dhan Maya Lama showing that acquisition of her citizenship was through her husband Man Bahadur Lama. Mr Bhattarai's affidavit also exhibits letters from various authorities testifying to a marriage relationship between the plaintiff and Dhan Maya Lama including one from the Acting Chairman of the Ratnanagar Town Oriented Village Development Committee dated 18 April 1997 to the effect that Dhan Maya Lama and Man Bahadur Lama have a relationship of man and wife and at present the husband of Mrs Dhan Maya Lama is residing in New Zealand.

The evidence is largely hearsay and in some respects contradictory. No certificate of a marriage between the plaintiff and Dhan Maya Lama or any person other than Shirley Anne Lama, has been produced, but there is ample evidence to show that a marriage in Nepal, certainly around 1965, was not a matter of official record. I note that the evidence submitted in respect of the plaintiff's sister's marriage to Dhan Bir Tamang was of registration 16 years after the marriage took place in 1979. I do not find convincing the plaintiff's explanation that Dhan Maya Lama is his sister, not his wife. There is documentary evidence which records Dhan Maya Lama as the wife of the plaintiff. That does not preclude the possibility of there being a woman of the same name who is the plaintiff's sister.

I am satisfied that the evidence obtained by the defendant and attested to in the affidavits of Mr Atkinson and Mr Bhattarai provides sufficient grounds to justify the defendant in making the order to deprive the plaintiff of his New Zealand citizenship. I note that the evidence provided by Mr Bhattarai's affidavit is additional to that available to the defendant when he issued the notice under s.17 of the Act on 27 August 1995. It extends and confirms the evidence previously available to the defendant of the plaintiff's marriage to Dhan Maya Lama. The plaintiff has failed to discharge the onus which rests on him to satisfy me on the balance of probabilities that he had not entered into a marriage according to the customs of Nepal, prior to his marriage with Shirley Anne Lama. In reaching this decision I am mindful of the implications of loss of citizenship for the plaintiff.

Accordingly, I decline to make the declaration sought under s.19(2) of the Citizenship Act 1977. No application for costs has been made and I make no order.

Justith Patten, J.