Rua and Kimiia v. Maoate

Court of Appeal
Roper, O'Regan and Dillon JJ.A.
14 July 1987

Constitutional law – members of Parliament – absence by member for more than fourteen consecutive sitting days – Electoral Act 1966, section 7 – whether cured by retrospective amendment to Electoral Act.

Statutes – retrospective operation – no statute to be construed to have retrospective operation unless its language is such as plainly to require such construction.

Constitutional law – Article 39 of the Constitution – whether statute is for peace, order, and good government.

The appellants appealed against the decision of Speight C.J. in the High Court, in *Rua and Kimiia* v. *Maoate,* p. 1, supra. The facts are set out in the headnote to the High Court decision, supra.

HELD: The appeal was dismissed. Taken as a whole the wording of the Electoral Amendment Act 1987 allows of no other conclusion than a retrospective validation of the absence of the respondent and the result that his seat did not become vacant.

Cases referred to in judgment:
Allan v. *Carew* (1896) 14 N.Z.L.R. 569
Hutchinson v. *Jauncey* [1950] 1 K.B. 574; [1950] 1 All E.R. 165
Pardo v. *Bingham* (1868) L.R. 4 Ch. App. 735
In Re Universal Management Ltd. [1983] N.Z.L.R. 462
Sharplin v. *Broadlands Finance Ltd.* [1982] 2 N.Z.L.R. 1
Tangata v. *The Speaker of the Legislative Assembly,* unreported, High Court, O.A 3/77, 23 December 1977, Donne C.J.

Legislation referred to in judgment:
Acts Interpretation Act 1924 (N.Z.)
Acts of Parliament (Commencement) Act 1793 (G.B.)
Constitution of the Cook Islands, Articles 39, 45
Credit Contracts Act 1981 (N.Z.)
Declaratory Judgments Act 1908 (N.Z.)
Electoral Act 1966
Electoral Amendment Act 1987
Judicature Act 1980-81
Moneylenders Act 1908 (N.Z.)
Rent Restriction Acts 1920, 1938, 1939 (U.K.)

Other sources referred to in judgment:
Maxwell on the Interpretation of Statutes (12th ed. 1969)

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

Judgment of the Court:

This is an appeal against a Judgment of Speight C.J. in which he refused to make the order sought by the appellants under the Declaratory Judgments Act 1908 (N.Z.), to the effect that the respondent's seat in the Cook Islands' Parliament was vacant. The appellants are duly enrolled electors in the Ngatangiia constituency and the respondent, Dr Maoate, the duly elected member of that constituency.

The facts are not in dispute. Between 10 and 25 July 1986 (inclusive) the Cook Islands Parliament met twelve sitting days and did not meet again until 24 November when business was transacted. On 25, 26 and 27 November no business was transacted because of the lack of a quorum.

Dr Maoate, who is the Deputy Prime Minister, was not present at any of the July sittings as he was then attending a Food and Agricultural Organization meeting in Rome as the Cook Islands Government's representative. Neither did he attend the sitting of 24 November, or the adjourned sittings of 25, 26 and 27 November, because from 20 to 27 November he was attending a high level Ministerial conference in Noumea. Cabinet approval to his attending that conference was given on 5 November.

At the same time of Dr Maoate's consecutive days' absence from Parliament section 7(1)(e) of the Electoral Act 1966 read:

> The seat of a member shall become vacant if –
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> . . .
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> (e) on fourteen consecutive sitting days he fails, without permission of Parliament, to attend in Parliament or any committee thereof.

It is common ground that although Dr Maoate attended the Rome conference as the Cook Islands Government's representative, and had Cabinet approval to go to the conference in Noumea, there had been no formal "permission of Parliament" granted to be absent. It is obvious that members of Dr Maoate's party realised that he was in peril and deliberately refrained from attending Parliament on the fourteenth day of absence (25 November) in the belief that an adjournment for lack of a quorum would not count as a "sitting day" in terms of section 7(1)(e). They pursued this course on the following days until Dr Maoate attended Parliament on 28 November. Their efforts were in vain. Although there was some doubt at the time it is now common ground that a sitting adjourned for lack of a quorum is a "sitting day" in terms of section 7(1)(e).

It is now clear that had members of Dr Maoate's party gone about things in the right way, and, if needs be, amended or suspended Standing Orders, the requisite permission could have been obtained on 25 November without difficulty.

On 10 February the appellants filed their application seeking an order declaring that Dr Maoate's seat in Parliament was vacant; and on 13 February the Queen's Representative gave his assent to the Electoral Amendment Act 1986-87 (hereafter referred to as "the amending Act") which contains a number of amendments to the

Electoral Act, which have no relevance to the present enquiry, except for section 3 which reads:

> The seat of a member shall become vacant if:
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> (e) On fourteen consecutive sittings 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.

The appellants' application came before Speight C.J. on 18 March, with his judgment being delivered on 23 March, wherein he declined to make the order sought.

On 14 April the appellants filed an application seeking leave to appeal against the Learned Chief Justice's decision and on 2 May he granted such leave. It appears there was no objection to the grant.

On 18 May Mr Manarangi, on behalf of the present respondent, applied for leave to appeal against the Chief Justice's order granting the appellants leave to appeal on the ground that the appellants' application for leave was filed out of time with effect that the order of 2 May granting leave was made without jurisdiction.

Mr Manarangi made it clear that his application was made as a matter of "jurisdictional housekeeping" out of a duty to the Court, and not with the intent of seeking a "procedural advantage". It is unnecessary to dwell at length on this aspect of the case. It is true that the appellants' notice of appeal was filed one day out of time in terms of section 54 of the Judicature Act 1980-81. There are reasons (which were advanced by Mr Manarangi but which we need not go into) which make it questionable whether the High Court, or indeed this Court, has power to extend the time for appealing beyond the twenty one days provided by section 54, but the matter can be met by this Court granting special leave to appeal pursuant to Article 60(3) of the Constitution. To put this present appeal on a proper jurisdictional footing we grant special leave to both the appellants and the respondent with the consequence that the Chief Justice's grant of leave is set aside.

The basic issues before Speight C.J. were whether the amending Act had retrospective effect, and, if it did, whether it saved the position for Dr Maoate, or was ultra vires the provisions of the Constitution. Speight C.J. concluded that the amending Act had retrospective effect so that Dr Maoate's seat did not become vacant and that it was not in breach of the Constitution.

The appellants' Notice of Appeal contains no less than eighteen grounds of appeal. Many could hardly be called "grounds of appeal" being merely criticisms of the way Speight C.J. expressed himself, or dealing with collateral issues. Mr Ingram accepted that the Notice of Appeal may have been drafted with excessive zeal and wisely limited his case to two main issues.

In the High Court Mr Ingram had argued that if the amending Act had

retrospective effect then it was ultra vires the Constitution in two respects, one being that it did not fall within the law-making power of the Cook Islands' Parliament as provided in Article 39 of the Constitution. That article provides that the Legislative Assembly may make laws for the "peace, order and good government" of the Islands. Mr Ingram did not pursue that argument before us. His case on the appeal was that the amending Act had no retrospective effect that helped Dr Maoate's cause, but if it did then it was ultra vires Article 45 of the Constitution, which deals with the "Commencement of Acts" which will be referred to in more detail later.

The general principles relating to retrospective enactments are well established and there was no difference of opinion between counsel concerning them. It is a fundamental rule of English law that no statute shall be construed so as to have retrospective operation unless its language is such as plainly to require such a construction; and allied to that is the rule that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary. The courts will scrutinize with special care a statute which appears to take away a vested right. In such a case only express enactment or irresistible inference will serve. (See *Allan* v. *Carew* (1896) 14 N.Z.L.R. 569 at 571.) Mr Ingram submitted that the instant case was one concerning "a vested right" namely, the right of the electors of Ngatangiia to decide in a by-election whether Dr Maoate should be re-elected. We have reservations whether such a "right" could properly be regarded as a "vested right" in this context but we are prepared to so regard it for the purpose of this exercise.

The question is then whether the amending Act by express enactment or irresistible inference has a retrospective operation with effect that Dr Maoate's seat is saved.

Mr Ingram submitted that if the amending Act has any retrospective effect at all it does not go so far as to pardon a breach of section 7(1)(e) which had already operated and created a vacancy. In the case of *Tangata* v. *The Speaker of the Legislative Assembly of the Cook Islands*, unreported, High Court, O.A 3/77, 23 December 1977, Donne C.J. held that vacancy of the seat is automatic once the circumstances in the various paragraphs of section 7(1) are demonstrated, and Mr Ingram argued from that, that Dr Maoate's seat became vacant at the end of the fourteenth consecutive day on which he did not sit.

There is no doubt that it is competent for Parliament to alter status retrospectively and indeed Speight C.J. referred to a number of decided cases where it had been done and in particular *Hutchinson* v. *Jauncey* [1950] 1 K.B. 574; [1950] 1 All E.R. 165 which he considered of particular relevance to the present enquiry. It was a case where the previously existing rights of a landlord were set aside by retrospection. The landlord had served a valid Notice to Quit on the tenant expiring on 25 April 1949. The tenant did not comply and on 25 May the landlord issued proceedings claiming possession. On that date, as the law then stood, the tenancy was not within the protection of the Rent Restriction Acts because of the sharing of part of the accommodation. On 2 June 1949 an amending Act came into force which extended the protection of the Rent Restriction Acts to cases where the tenant shared accommodation with others. It was enacted that the extending provisions were to apply "whether the letting in question began before or after the commencement of the Act", which the English Court of Appeal held to be clear words intended to have retrospective effect which saved the tenant from eviction.

Two other cases referred to by counsel require consideration and the first is *Sharplin* v. *Broadlands Finance Limited* [1982] 2 N.Z.L.R. 1, a judgment of the Court of Appeal. In that case judgment had been given for Broadlands in the High Court on certain money-lending transactions applying the law as contained in the Moneylenders Act 1908. Between the date of the High Court judgment and the hearing of the appeal the Credit Contracts Act 1981 came into force which repealed the Moneylenders Act 1908 and other statutory provisions on which the High Court judgment had been based. Section 53(1) of the Credit Contracts Act provided that the Act was to apply "in respect of every credit contract whether made before or after the commencement of this Act". The Court of Appeal held that the appeal must be decided under the 1981 Act. At p. 8 McMullin J. said: "the Credit Contracts Act 1981 is clearly retrospective in its operation in the sense that it takes away or impairs any vested right acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past". The second case is *Re Universal Management Ltd.* [1983] N.Z.L.R. 462, also a judgment of the Court of Appeal, on which Mr Ingram relied. It is a case which involved what Cooke J. referred to as "some unattractive statutory intricacies". The liquidators of the Universal Group of companies applied for certain mortgages to be set aside as fraudulent preferences. Between the issue of the proceedings and the hearing there were certain changes in the statutory law which the mortgagees argued destroyed the liquidators' rights to proceed with the setting aside application. The Court of Appeal rejected that argument on the ground that the amending Act contained nothing adapted to the completion of the proceedings under the old law so that section 20(g) of the New Zealand Acts Interpretation Act 1924 applied. That Act applies in the Cook Islands and section 20(g) reads:

> (g) Any enactment, notwithstanding the repeal thereof, shall continue and be in force for the purpose of continuing and perfecting under such repealed enactment any act, matter, or thing, or any proceedings commenced or in progress thereunder, if there be no substituted enactments adapted to the completion thereof:

At p. 575 McMullin J. said:

> Nor do I think that Mr Wilson's argument that the legislation is retrospective in operation can succeed. As the matter is put in *Maxwell on the Interpretation of Statutes* (12th ed. 1969) p. 216:
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> > "no rule of construction is more firmly established than this; that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."
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> The present case is quite different from the statutory provision discussed in *Sharplin* v. *Broadlands Finance Ltd.* [1982] 2 N.Z.L.R. 1. In that case the statute under consideration, the Credit Contracts Act 1981 which repealed the Moneylenders Act 1908 was expressly made applicable to all contracts whether entered into before or after the commencement of the Credit Contracts Act.

We do not think the Universal Management case helps the appellants, nor that decisions in other decided cases are of much assistance in this field of the law. It is simply a matter of applying the well known general principles to the actual wording of the enactment under review. Speight C.J. concluded that the wording of the amending Act in the instant case "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." We are in complete agreement with that conclusion. The words "whether such failure to so attend shall have occurred before or after the coming into force of this Act", in so far as they talk of the past, can only refer to a past failure to attend on fourteen consecutive days, and the "deeming" provision makes it even clearer that the intention is to regularize a past breach.

(Although it was not a matter raised by counsel we believe an argument could be raised that Parliament's permission under section 7(1)(e) could have been given under the original paragraph *after* the fourteen days' absence, and perhaps could still be given.)

We turn now to Mr Ingram's Constitution argument, which was to the effect that if the amending Act has retrospective effect it is ultra vires Article 45 of the Constitution.

Article 45 reads:

> 45. *Commencement of Acts* – Every Act shall come into operation either on the day on which the Bill is assented to, or on any date (whether earlier or later than the date on which it is assented to) specified in that behalf in the Act, and different dates may be so specified in respect of different provisions of the Act.

We agree with Speight C.J. that there is nothing novel in Article 45. Section 8 of the Acts Interpretation Act 1924 (N.Z.) is to the like effect, as is the Acts of Parliament (Commencement) Act 1793 (G.B.). They read:

> 8. Acts assented to, when to come into operation – Every Act assented to by the Governor-General in (Her Majesty's) name that does not prescribe the time from which it is to take effect shall come into operation on the day on which it receives the Governor-General's assent.
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> The clerk of the Parliaments shall endorse (in English) on every Act of Parliament which shall pass after the eighth day of April one thousand seven hundred and ninety three, immediately after the title of such Act, the day, month and year when the same shall have passed and shall have received the royal assent; and such endorsement shall be taken to be a part of such Act and to be the date of its commencement where no other commencement shall be therein provided.

Mr Ingram submitted that in terms of Article 45 an Act must necessarily come into operation either on the day on which the Bill is assented to, or on the date specified in the Act and that as the amending Act did not specify a date it must necessarily have come into operation on the day the Bill was assented to, that is 13 February 1987.

We know of no authority for the proposition than an enactment can only have retrospective effect from a date in the past specified in the enactment itself. If Article 45 has that effect, as Mr Ingram argued, then the New Zealand and United Kingdom provisions must have the same effect, which manifestly is not the case.

280 Indeed, the Credit Contracts Act 1981 which was referred to in *Sharplin* v. *Broadlands Finance Ltd.* was held to have retrospective effect although it did not come into force until seven months *after* it received the Royal Assent. *Pardo* v. *Bingham* (1868) L.R. 4 Ch. App. 735 was a retrospection case in which Lord Hatherly L.C. said at p. 740:

> 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.

290 The coming into "operation" of a statute and its "effect" once in operation are two different things and Mr Ingram's submission fails to recognize that distinction. That is enough to dispose of Mr Ingram's constitutional argument.

We conclude therefore that Speight C.J. was right in holding that the amending Act has a retrospective effect which pardons Dr Maoate for his absence and is not contrary to the provisions of the Constitution.

The Appeal is therefore dismissed. As we heard no submissions on the question of costs and note that none were awarded in the High Court we reserve the question of costs.