

FEB 27 2012

ASST. CLERK OF COURTS
REPUBLIC OF MARSHALL ISLANDS

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

In Re the Citizenship of TARATIERA) CIVIL ACTION No. 2009-239
KIRITIANO,) CIVIL ACTION No. 2010-183
by) CIVIL ACTION No. 2010-184
TARATIERA KIRITIANO,)
Petitioner.)

In Re the Citizenship of CHRIS)
KIRITIANO,) ORDER
by)
CHRIS KIRITIANO,)
Petitioner.)

In Re the Citizenship of ELLEN)
KIRITIANO and NUARO KIRITIANO,)
by)
ELLEN KIRITIANO,)
Petitioner.)

TO : Witten T. Philippo, counsel for petitioners
Jack Jorbon, Assistant Attorney General
Micronesia Legal Services Corporation, as friend of the court

This matter initially came before the court as a single petition for the four (three adult and one minor) petitioners to be registered as citizens. At the request of the court, the original petition was separated into three petitions for each of the adult petitioners. The basis for the petitions was the constitutional provision that a person of Marshallese descent may, in the interests of justice, become a citizen through registration.¹ The court requested briefing on the meaning of “interests of justice” in this citizenship context and extended an invitation for briefs

¹RMI Constitution, Article XI, Section 2(1): “any person who is not a citizen of the Republic of the Marshall Islands shall become a citizen by registration if, upon application, the High Court is satisfied . . . (c) that he is of Marshallese descent, and that in the interests of justice his application should be granted.”

to other interested parties as “friends of the court.” Micronesian Legal Services Corporation responded by filing a brief.

The court determines the term “interests of justice” has no fixed meaning, but must be evaluated through the balancing of a number of factors with due regard to the Constitutional framework relating to citizenship and the “needs of the Republic, taking into account this Constitution as a whole and the circumstances in the Republic from time to time.”²

I. Constitutional Framework for Acquiring Citizenship

The Constitution provides three avenues to become a citizen. First, a person “shall be a citizen” if

- (a) at the date of his birth, either of his parents is a citizen of the Republic; or
- (b) he is born in the Republic and is not at his birth entitled to be or become a citizen of any other country.³

Second, a person may become a citizen through registration, upon satisfaction of the High Court

- (a) that he has land rights; or
- (b) that he has been resident in the Republic for not less than 3 years, and is the parent of a child who is a citizen of the Republic; or
- (c) that he is of Marshallese descent, and that in the interests of justice his application should be granted.⁴

Finally, a person may become a citizen pursuant to an Act of the Nitijela providing for citizenship by registration for cases not covered in Article XI, Section 2, or an Act of the Nitijela

²RMI Constitution, Article I, Section 3(1).

³RMI Constitution, Article XI, Section 1(2)

⁴RMI Constitution, Article XI, Section 2(1).

providing for citizenship by naturalization.⁵

II. Marshallese Descent

It may be seen from the Constitutional provisions relating to citizenship that the Marshallese descent/interests of justice provision is not the only avenue to citizenship. Article XI, Section 1(2) provides a person “shall be a citizen” through one of two ways: he or she has a parent who is a citizen, or he or she is born in the Republic, but is not entitled to citizenship in another country. This limitation on citizenship for those born in the Republic to non-Marshallese citizens emphasizes the importance of the blood relationship in the Marshall Islands. This importance flows through Section 2 where eligibility for citizenship by registration also emphasizes the blood relationship. First, one who has land rights is eligible for citizenship by registration.⁶ The entitlement to land rights under custom is based upon family relationships. Second, one who is a parent of a Marshallese citizen may become a citizen, coupled with a residential requirement. Again, a blood relationship forms the basis of eligibility. Finally, one who is “of Marshallese descent” is eligible, coupled with a showing that the application is in the interests of justice. Again, the blood relationship, establishing such descent, is a condition of eligibility for citizenship.

The provisions that a person with a Marshallese parent “shall” be a citizen (Art. XI, Sec. 1(2)(a)) and a person with land rights may become a citizen through registration (Art. XI, Sec.

⁵RMI Constitution, Article XI, Section 3(a) and (b).

⁶A person who, before the effective date of the Constitution, was a citizen of the Trust Territory and had a parent with land rights became a citizen of the Republic. Article XI Section 1(1). This further demonstrates the constitutional significance of having land rights, and thus Marshallese blood.

2(1)(a)) suggest that Marshallese descent must be understood to cover situations beyond either of these two situations. In other words, “Marshallese descent” is not limited to the off-spring of a Marshallese parent, or to a person who has land rights in the Marshall Islands. The question then becomes, what blood relationship to a Marshallese ancestor does not include parents or land rights? Anthropologist Jack Tobin, in *Land Tenure in the Marshall Islands* suggests that paternal usufruct rights diminish over time. For such patrilineal rights: “The ajri rights become weaker with each succeeding generation and are absolutely concluded with the seventh generation, tibjer, which means ‘depart from glory.’”⁷

Iroiylaplap and former President Amata Kabua explains “In the Marshall Islands . . . the custom specifies that there are two distinct categories of land ownership and primarily gives the bwij’s [matrilial clan] members permanent land rights and authority over those rights and botoktok [patrilineal clan] member interim land rights that last for a few generations.”⁸

These authorities suggest that land rights derived from the paternal line diminish over time and, at some point, come to an end. In such a case, a person could be of “Marshallese descent,” yet not have land rights. Consequently, the class of persons affected by this provision (Art. XI, Sec. 2(1)(c)) is relatively small, and primarily consists of those who spring from a male Marshallese ancestor and have been absent from the Marshall Islands for several generations. To date, most petitions filed under this provision have been from citizens of the Republic of Kiribati, the island nation immediately to the south of the Republic of the Marshall

⁷Jack Tobin, *Land Tenure in the Marshall Islands*, p. 20.

⁸Amata Kabua, *Customary Titles and Inherent Rights, A General Guideline in Brief*, p. 16.

Islands.⁹ Historically there has been significant cross migration between the two countries with resulting family ties across the boundaries of the two nations.

III. Interests of Justice

Under Art. XI, Sec. 2(1)(c), the petitioner must not only be of Marshallese descent, but the application must also be “in the interests of justice.” Consequently, the constitution places upon the applicant under this section an additional condition beyond that of being of “Marshallese descent.” The term “interests of justice” is not defined in the Constitution, nor in statute in the RMI. However, the fact that the provision places an additional condition upon the applicant means that the constitutional framers intended that condition to have some substance. It was not placed in the constitution to have no meaning.

A. Courts Have Interpreted “Interests of Justice” in Other Contexts

Courts have interpreted “interests of justice” in a number of different contexts, ranging from criminal to juvenile matters to civil procedure. A common thread in applying an “interest of justice” standard is the balancing of the various competing interests affected through the consideration of a number of factors. An example is the decision by the appellate division of the New York Supreme Court in *People v. Clayton*. In that case, the court interpreted a statutory provision allowing the trial court to dismiss a criminal indictment when “dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such

⁹The court is unaware of any petitions under this provision from descendants of naturalized Marshallese citizens who may be of other ethnic origin, such as Filipino or Chinese ancestry. The court does not decide at this time whether such petitioners would be considered “of Marshallese descent.”

indictment or count would constitute or result in injustice.”¹⁰ The court stated:

The sensitive balance between the individual and the State that must be maintained in applying the test of *the interests of justice* . . . moves in response to factors largely resting on value judgments of the court. But those judgments in turn hinge on the production of facts in the possession of the prosecution and the defendant. Moreover, the discretion of the court cannot be properly reviewed unless the record discloses the facts upon which the court's judgment was based.¹¹ (emphasis added)

Three principles are revealed here for evaluation of the “interests of justice.” First, determination of the interests of justice involves a balancing between the affected interests - in *Clayton*, those of the individual and the state. Second, the decision rests in the discretion of the court, based upon the value judgments of the court. Finally, this discretion must be based upon facts in the record which may be the basis for review. In *Clayton*, the court determined:

Among the considerations which are applicable to the issue are (a) the nature of the crime, (b) the available evidence of guilt, (c) the prior record of the defendant, (d) the punishment already suffered by the defendant, (e) the purpose and effect of further punishment, (f) any prejudice resulting to the defendant by the passage of time and (g) the impact on the public interest of a dismissal of the indictment.¹²

While this list of factors is not directly applicable to the determination of the “interests of justice” in the context of Marshallese citizenship, it shows that analysis of the private and public interests is based upon weighing various relevant factors evidencing those interests.

In determining whether a juvenile should be transferred to adult court under the Federal Juvenile Delinquency Act (FJDA), the Act requires a finding by the court that such transfer would be in the interests of justice.

¹⁰CPL 210.20.

¹¹*People v. Clayton*, 41 A.D.2d 204, 207-08, 342 N.Y.S.2d 106 (1973)

¹²*Ibid.*

Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in *the interest of justice*: the age and social background of the juvenile; the nature of the alleged offense; the extent and nature of the juvenile's prior delinquency record; the juvenile's present intellectual development and psychological maturity; the nature of past treatment efforts and the juvenile's response to such efforts; the availability of programs designed to treat the juvenile's behavioral problems. In considering the nature of the offense, as required by this paragraph, the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer.¹³ (emphasis added)

Again, a determination of the “interests of justice” requires a balancing of a number factors evidencing private and public interest.

Similarly, in considering the basis for an extension of the time of service, the New York Court of Appeals found the need to balance a number of factors to apply the “interest of justice” standard:

The *interest of justice* standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant.¹⁴ (emphasis added)

The court went on to state: “No one factor is determinative--the calculus of the court's decision is dependent on the competing interests of the litigants and a clearly expressed desire by the

¹³18 U.S.C.A. § 5032

¹⁴*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 105-106, 736 N.Y.S.2d 291, 761 N.E.2d 1018 (2001)

Legislature that the interests of justice be served.”¹⁵

In considering whether to transfer venue, federal courts in the U.S. must consider the interest of justice. “For the convenience of parties and witnesses, in the *interest of justice*, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”¹⁶ (emphasis added.) In applying this standard, it has been observed that factors involving both private and public interests must be considered:

Courts have often separated factors involving private *interests of justice* from those involving public *interests of justice*. Private-interest factors that a court should weigh include: (1) the plaintiff's choice of forum, unless the balance of convenience is strongly in favor of the defendants; (2) the defendant's choice of forum; (3) whether the claim arose elsewhere; and (4) the ease of access to sources of proof. . . . Public-interest factors a court should weigh include: (1) the transferee's familiarity with the governing laws; (2) the relative congestion of the calendars of the potential transferee and transferor courts; (3) the local interest in deciding local controversies at home; and (4) the enforceability of the judgment. . . . The unfairness of imposing jury duty on citizens in a forum unrelated to the action is also cited as a public interest factor to be considered in transferring a case.¹⁷ (footnotes omitted and emphasis added.)

Based upon these precedents, evaluation of the “interests of justice” is to be done on the basis of balancing appropriate factors addressing the various interests involved. In consideration of dismissal of a criminal information, the court in *Clayton* considered the individual defendant’s interest and the interest of the state. Under the Federal Juvenile Delinquency Act, the courts are directed to consider in interest of the juvenile and the interest of the public, as exhibited by the

¹⁵*Ibid.*, at p. 106.

¹⁶28 U.S.C.A. § 1404(a).

¹⁷§ 1271. Factors involving the interest of justice, 32A Am. Jur. 2d Federal Courts § 1271

stated factors. In *Leader*, dealing with the extension of time of service, the court balanced the interests of the competing parties. Courts, in applying the interest of justice standard to the determination of whether to transfer venue, look to the interest of the plaintiff, the interest of the defendant and the interest of the public, by weighing various relevant factors.

B. Interests of Justice in the Citizenship Context

Courts, in interpreting “the interests of justice” have resorted to a balancing test, weighing a number of factors designed to reflect the interests of the various parties and the public. This suggests that in a citizenship case brought under the Marshallese descent/interest of justice provision of the Constitution, the court must (1) identify the affected interests, (2) establish appropriate factors for consideration of these interests and (3) weigh these various factors to determine the interests of justice.

In identifying the interests to be considered, the court should consider what interests are affected by the proposed citizenship action.¹⁸ The interest of the applicant is readily identifiable as one which must be considered. The interest of the nation as a state are clearly involved, as the

¹⁸Professor J. Donald Galloway, in *THE DILEMMAS OF CANADIAN CITIZENSHIP LAW*, 13 *Geo. Immigr. L.J.* 201, footnote 26, suggests the following considerations:

To defend its claim to legitimacy in a mobile world, a legal authority would need to develop citizenship laws that reflect the interplay of four separate determinations: (1) the present and future interests of the collectivity-including whether the society will be more likely to flourish if membership is limited to those with certain characteristics or virtues; (2) whether the link between the community and a putative member (such as birth or residence in the territory) is of such a nature to give rise to claim in justice that the individual be recognized as a member; (3) the strength of the interests of persons already defined as members (regarding, for example, membership for their children or the impact of new additions); and (4) the strength of the interests of persons excluded from membership.

nation has an interest in who it allows to become a citizen. Less obvious perhaps, yet distinct in some ways from the interests of the nation as a whole, are the interests of current citizens. For instance, an applicant may have job skills that will strengthen the nation as a whole, yet may displace a current citizen from his or her job.

1. Interests to be considered.

The Constitution has identified a primary interest of the applicant, i.e., his or her status as a person of Marshallese descent. This link is a condition for applying under the specific constitutional authority at issue. The strength of that link may become less over time as generations pass as addressed in the discussion of “Marshallese descent” above. However, it may also be that the applicant has emotional or other family ties to the Republic or identifies himself or herself as a member of the Marshallese community as shown by the applicant’s knowledge of Marshallese history, culture and language or other ties. The motivation behind the person’s application for citizenship may be considered. The Republic has identified potential concerns in this regard, stating “most of the descendants that have acquired their Marshallese citizenships through registration over the past years are now residing in the United States. It is quite obvious to us that these people were only interested in getting their citizenship in order to migrate to U.S.”¹⁹ While there is no source given for this assertion, the issue it raises is one that must be considered. An applicant who intends to utilize citizenship merely as a stepping stone to the U.S. will not contribute to the country and does not demonstrate a significant link to the Marshall Islands.

¹⁹Brief Against Granting of Citizenship to Descendants in the Interest of Justice, filed June 3, 2011, p. 2.

The interest of the nation as a state must be considered. What will be the effect on the nation if citizenship is granted to the applicant under the “Marshallese descent” provision? Does the applicant have skills or other resources that will strengthen the nation? Will there be an overall benefit to the nation as a whole if the application is granted? Conversely, will the person be a burden on society by having no job skills or education, or having a health condition that will endanger public health or consume scarce health care resources?

An additional consideration is the interest of current citizens. In the brief filed by the Republic, factors related to this interest are identified. “The Republic is currently facing the toughest economic, social and political times in its history. The unemployment rate is exceptionally too high. Most of its citizens are currently struggling to make ends meet. Scarce jobs have been unjustly taken away from them by foreigners.”²⁰ If an applicant will be taking a job away from a current citizen, the interest of the current citizen must be considered. If an applicant will convey a contagious disease that could infect a citizen, that interest must be considered. If an applicant may be criminally a danger to others, that interest must be considered.

2. Factors to be weighed.

Having identified the interests to be considered in the interest of justice determination, the court should ascertain specific factors to weigh in the balancing of the interests. The following personal characteristics of the applicant are factors which could affect the applicant’s interest, the public or national interest, and the interest of current citizens:

1. The education, health and job skills of the applicant;

²⁰*Ibid.*

2. The criminal record, if any, of the applicant;
3. The motivation of the applicant for applying for Marshallese citizenship;
4. The applicant's means of support and financial resources; and
5. The number of dependents of the applicant.

The following links between the applicant to the Republic address both the interest of the applicant and the national interest:

6. The number of generations between the applicant and the applicant's Marshallese ancestor;
7. The length of residence of applicant in the Republic;
8. Other family members of the applicant residing in the Republic or holding Marshallese citizenship;
9. The applicant's demonstrable knowledge of Marshallese culture, history and language;
10. Other connections between the applicant and the Republic;

Additionally, the following factors, if present, should be considered:

11. Any exceptional circumstances surrounding the applicant that should be considered;
12. The effect of the application on current citizens; and
13. Any other factors which may be relevant to the consideration of the application.

As the courts gain more experience with these applications, additional factors may become relevant. However, addressing these factors will provide a factual basis for the court to rely upon in making its decision, as well as to provide a record for any reviewing court.

IV. Conclusion

In evaluating the "interests of justice" for the purpose of determining eligibility for registration for citizenship of an applicant of Marshallese descent, the court will balance the

competing interests of the applicant, the Republic, and existing citizens. To do so, it will weigh factors identified as indicators of those interests. Consideration of those facts provides a basis for a reasoned exercise of the court's discretion, as well as a record for any reviewing court.

ORDER

Based upon the forgoing, it is hereby ORDERED as follows:

1. The petitioners in each of the captioned cases shall file and serve upon the Republic a supplement to their respective petitions addressing the factors listed above within 30 days of the entry of this order;
2. The supplement shall include an affidavit relating to petitioners' *menmenbwij* indicating the person who created the document and sufficient evidence of its reliability; and
2. Upon filing the supplement to the petition, each petitioner may request a hearing on the petition.

Date: February 27, 2012.


James H. Plasman
Associate Justice, High Court